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In the Supreme Court of the United States

October Term, 1983

ROBERT STERN,
Petitioner,

vs.

KENNETH SHOULDICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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September 9, 1983

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QUESTIONS PRESENTED FOR REVIEW

1. DOES A POST-JUDGMENT MOTION TO AWARD PRE-JUDGMENT INTEREST ON A CLAIM FOR LIQUIDATED DAMAGES UNDER 42 USC §1983 TOLL THE TIME FOR FILING NOTICE OF APPEAL?
2. DOES A COMPLAINT FOR "ACTUAL DAMAGES" FOR LOSS OF EMPLOYMENT, BROUGHT UNDER 42 USC §1983, STATE A CLAIM FOR BACK PAY AS LEGAL DAMAGES?

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	11
I. A post-judgment motion to award pre-judgment interest on a claim for liquidated damages under 42 USC §1983 does not toll the time for filing notice of appeal	11
II. A complaint for actual damages for loss of employment, brought under 42 USC §1983, states a claim for back pay as legal damages	14
CONCLUSION	19

TABLE OF AUTHORITIES

	PAGE
Bituminous Casualty Co v *Lynn*, (CA6, 1974) 503 F2d 636, 645	12
Bricklayers' Pension Trust Fund v *Taiariol* (CA6, 1982) 671 F2d 988, 990	12, 13
Casto v *Arkansas-Louisiana Gas Co* (CA10, 1977) 562 F2d 622, 624	11
Chicago & Northwestern Railway Co. v *Union Packing Co (CA8, 1976) 527 F2d 592*	13
Furtado v *Bishop* (CA1, 1979) 604 F2d 80	12
Heritage Homes of Attleboro, Inc v *Seekonk Water District* (C1, 1981) 648 F2d 761	12
Lodges 743 and 1746, International Association of Machinists and Aerospace Workers v *United Aircraft Corp* (CA2, 1975) 534 F2d 422, 446, fn.42, *cert. den.*, 429 US 825	11
Louisiana & Arkansas Railway Co v *Export Drum Co* (CA5, 1966) 359 F2d 311, 316-317	11
Moore-McCormick Lines v *Amirault* (CA1, 1953) 202 F2d 983, 895	12
Rodgers v *United States* (1947) 332 US 371, 68 S CT 5, 92 L Ed 3	11
Royal Indemnity Co v *United States* (1941) 313 US 289, 61 S Ct 995, 85 L Ed 1361	11
Shirley v *Chagrin Falls Exempted Village Schools Board of Education* (CA6, 1976) 521 F2d 1329, 1334, *cert. den.* 424 US 913	16
White v *New Hampshire Department of Employment Security* (1982) 455 US 445, 102 S Ct 1162, 71 L Ed 2d 325	14

* * *

	PAGE
U.S. Const., Amendment I	3
U.S. Const., Amendment XIV	3
28 USC §1254(1)	4
42 USC §1983	3, 11, 14
706 F2d 742	13, 15, 17
Rule 17, Rules of the Supreme Court	18
28 USC §811	11
28 USC §1961	11
FRCP 60(a)	14

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Robert Stern, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this cause on April 15, 1983.

OPINIONS BELOW

The Opinion of the Court of Appeals, reported at 706 F2d 742, appears in the Appendix to this Petition. Also appearing in the Appendix are the following:

1. District Court Opinion on Motion for Summary Judgment granting summary judgment to Defendants with respect to Plaintiff's procedural due process claims, denying summary judgment to Defendants with respect to Plaintiff's First Amendment claims, and granting Defendant's Motion to Compel Withdrawal of Plaintiff's Counsel, entered February 1, 1977;

2. District Court Opinion as to Plaintiff's entitlement to jury trial, entered August 29, 1977;

3. District Court Opinion on Motions for New Trial/ JNOV, granting Defendants' motion for a new trial, entered June 16, 1978;

4. District Court Opinion denying Plaintiff's Motion to Add Parties Defendant, awarding back pay against the individual Defendants in their individual capacities, and dismissing Plaintiff's Complaint as to Defendant Lake Superior State College, entered September 19, 1980;

5. District Court Judgment entered September 23, 1980;

6. District Court Opinion on Motions, denying Defendants' Motion to Amend Judgment to Eliminate Back Pay, Granting Plaintiff's Motion for Attorney Fees, Costs and Pre-Judgment Interest, and denying Defendant Lake Superior State College's Motion for Costs and Attorney Fees, entered January 15, 1981;

7. District Court amended Judgment entered February 12, 1981;

8. Court of Appeals Order denying Plaintiff's Motion to Dismiss Defendants' Appeal, entered July 15, 1981;

9. Court of Appeals Order granting Plaintiff's Motion to Dismiss Defendants' Appeal, entered November 5, 1982;

10. Court of Appeals Order granting Defendants' Motion for Permission to File a Petition for Rehearing in Excess of 15 Pages, entered January 20, 1983;

11. Court of Appeals Order granting Defendants' Petition for Rehearing, entered March 25, 1983;

12. Court of Appeals Order vacating its November 5, 1982 Order Dismissing Defendants' Appeal, entered March 25, 1983;

13. Court of Appeals Opinion affirming in part and reversing in part the judgment of the District Court, entered April 15, 1983;

14. Court of Appeals Judgment entered April 15, 1983; and

15. Court of Appeals Order denying Plaintiff's Petition for Rehearing, entered June 20, 1983.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 15, 1983. A timely Petition for Rehearing was denied on June 20, 1983. This Petition for a Writ of Certiorari is filed within 90 days of June 20, 1983; and the jurisdiction of the Supreme Court of the United States is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const, Amendment I.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const, Amendment XIV, Section 1.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 USC §1983.

STATEMENT OF THE CASE

By Complaint filed in the United States District Court for the Western District of Michigan, Northern Division, Plaintiff alleged that the termination of his employment in consequence of the failure of the Defendants to recommend and grant tenure was in retaliation for his exercise of First Amendment rights. Plaintiff also alleged that the manner of his termination constituted a denial of his right to due process. Plaintiff's Complaint stated the following prayer for relief:

> WHEREFORE, the Plaintiff prays:
>
> (a) That a Judgment be entered ordering the Defendants, THE BOARD and THE COLLEGE to reinstate STERN, at least pending an administrative hearing, with retroactive pay at the rate that others with similar education, experience and responsibilities would have received at THE COLLEGE and prorated for the period of wrongful termination (since June 30, 1972).
>
> (b) That a Judgment be entered against the Defendants, THE BOARD and KENNETH SHOULDICE as an individual, jointly and severally, for $500,000.00 actual damages, plus attorney fees, and court costs.
>
> (c) That a Judgment be entered against the Defendants SHOULDICE and LINDEROTH, as individuals, jointly and severally, for $100,000.00 punitive exemplary damages.
>
> (d) That the Court order such other and further relief as is agreeable with equity and good conscience.

On January 31, 1977, the District Court entered its Opinion granting the Defendants' Motion for Summary Judgment in relation to Plaintiff's due process claim, but denying Defendants' motion as to Plaintiff's First Amendment claim. In that same Opinion, the District Court granted the Defendants'

Motion to Compel the Withdrawal of Plaintiff's Counsel. Noting that Plaintiff had filed a timely demand for jury trial, the District Court directed counsel to submit memoranda addressed to the issue of whether Plaintiff was entitled to a jury trial on the issues that remained.

On August 29, 1977, the District Court issued its Opinion ordering that a jury be empaneled for the trial of this cause.

On September 16, 1977, following four days of trial, a jury verdict was returned in Plaintiff's favor for reinstatement with back pay in the amount of $50,155.32 against Defendant Lake Superior State College, and for punitive damages of $1,000 each against the individual Defendants, Shouldice and Linderoth. On June 16, 1978, the District Court entered its Opinion denying Defendant's Motion for Judgment Notwithstanding the Verdict, but granting Defendants' Motion for a New Trial, for the reason that: "The verdict, however, was against the weight of the evidence, the damages awarded were excessive, and the circumstances indicate that the jury acted under a misapprehension of the law or in disregard of the Court's instructions."

After a second jury had been empaneled, Defendants' counsel raised, for the first time, the defense of Eleventh Amendment immunity and moved the District Court to dismiss Plaintiff's Complaint as to Lake Superior State College. In response to this motion, Plaintiff's counsel proposed the following:

> So what I would propose is that the trial court proceed, that the jury be allowed to determine liability in relation to the individual Defendants, and that the liability of the Defendant college be left for determination by the Court after a subsequent record can be made as to the nature of the entity with which we are dealing, and as to — so that we can deal with the question of whether or not the entity can appropriately claim Eleventh Amendment immunity.

Now in conjunction with that suggestion, I would further suggest that no question of back pay be submitted to the jury, based upon the decision of the Court granting Defendant's motion for a new trial after the conclusion of the last trial. I came to Court assuming that the question of back pay would be submitted to the Court, and based upon discussions with the Court prior to the time we commenced the trial, it was my understanding that the question of back pay would be decided by the Court upon a record made subsequent to the jury's return of a verdict in relation to the individual Defendants, if indeed they found those Defendants liable. If the jury in fact finds the Plaintiff's First Amendment rights were not violated, there would be no need for this Court to entertain any future questions, I would presume. If they find that the Plaintiff's First Amendment rights were violated, they may then assess damages in accordance with the Court's instructions in relation to the individual defendants, and I would ask the Court to subsequently entertain the question of back pay in the — and reinstatement in the context of the record that I feel needs to be made as a minimal effort to appropriately resolve the question of Eleventh Amendment immunity that was raised during this trial.

Additionally, the last jury verdict was set aside in part, and I think in large part, because of this Court's dissatisfaction with the way the jury treated the matter. Indeed the Court gleaned from the nature of the verdict awarded by the jury, some confusion as to their role and the meaning of the Court's instructions, and I would wish to do everything possible to avoid injecting any such confusion into these proceedings that very well could lead us into the necessity of trying this case yet a third time, and so I would just assume no question, not even in advisory capacity to the jury, and in order to make their

task as easy as possible, and to the extent that the Plaintiff's request or demand for jury is addressed in this cause to the question of reinstatement and back pay, I would hereby withdraw the request for a jury trial to that extent, and ask that on the question of a nominal, actual or compensatory, on [sic] punitive damages, as to the individual Defendants be submitted to the jury. Indeed, I can't see how the Defendants can complain of the withdrawal of the issue of reinstatement or back pay from the jury, since it has stedfastly [sic] and consistently and repeatedly throughout these proceedings opposed all of the Plaintiff's requests for submission of questions to the jury, and has never entered a demand for jury trial. As I say, the Plaintiff's [sic] posture has throughout this proceeding been open opposition to submission of any question to the jury, so I don't see how the Defendant can complain if we now demand a nonjury trial as it affects the question of reinstatement and back pay.

Indeed, by withdrawing the back pay and reinstatement from the jury, that would allow this Court upon whatever supplemental record is necessary or appropriate, to decide those issues, together with the issue of immunity, once we know the nature of the entity involved, and that basically is the position of the Plaintiff, and the reasons we have asserted in support of that position.

(Reporter's transcript, pp 1655-57)

Defendants' counsel responded to this proposal, in pertinent part, as follows:

If they think that the college should pay damages, that's a finding of fact, and the other side of the coin, that Linderoth and Schouldice were not acting individually. Okay. Then I think if the Court is disposed to hold to it the question of back pay, then I think the jury ought to be told that the question of back pay will be decided by the

> Court after their decision is made, and they should recognize, if they are finding compensatory, nominal or punitive damages, that the Court may, and it will, decide what award to the Plaintiff will be given on the basis of any pay that may be due him. I don't think the jury should have a shot at considering its determination of how much damages on the basis of, "Well, he was earning $12,000 a year, and he has been out of work ten years, we ought to give him 12 time 10, and we'll just call it nominal or compensatory damages or punitive damages."
>
> (Reporter's transcript, pp 1665-66)

During the discussion of instructions prior to submission of the case to the jury, the trial judge advised counsel as follows:

> Now as to the jury verdict form number two, which had been agreed, and I do believe that it is the responsibility of the Court to consider what damages if any, by way of, quote, back pay, unquote, there are to be assessed against the college and the other Defendants — and/or the other Defendant, that the traditional, common law concept of damages is stated properly in the instructions. I've heard no complaint from anybody about it, and that of course is the subject of jury verdict form number two.
>
> (Reporter's transcript, p 2004)

The trial judge then proceeded to instruct the jury, in pertinent part, as follows:

> You should include each of the following elements of damage for which you decide the Plaintiff should be compensated. Expenses of seeking other employment, stress, embarrassment and mental anguish, injury to professional reputation.
>
> (Reporter's transcript, p 2036)

The trial judge also charged the jury "that reinstatement of plaintiff to his former position, award of back pay, attorney's fees and costs of bringing this suit are matters which the Court will resolve at a future time and you are not to be concerned with them in determining the amount of any damages which you may award."

(Reporter's transcript, p 2037)

On December 14, 1979, at the conclusion of a 14 day trial, the jury awarded the Plaintiff nominal damages in the amount of two dollars against Defendant Linderoth and one dollar against Defendant Shouldice.

On September 19, 1980, the District Court entered its Opinion granting the motion to dismiss Plaintiff's Complaint as to Defendant Lake Superior State College on the ground of Eleventh Amendment immunity and denying Plaintiff's motion to amend his Complaint to add the individual members of the college's Board of Control as parties Defendant for the purpose of enabling the District Court to grant relief by way of reinstatement. In its Opinion, the District Court also determined that back pay be awarded as damages against the individual Defendants in the amount of $45,696.

On September 23, 1980, judgment was entered in the District Court for the nominal damages found by the jury and the back pay awarded as damages by the District Court.

Defendants Shouldice and Linderoth thereafter moved to amend the judgment so as to eliminate the District Court's award of back pay as damages; and Defendant Lake Superior State College moved for an award of costs and attorney's fees against the Plaintiff. The Plaintiff moved for an amended judgment allowing him to recover costs, pre-judgment interest, and attorney fees. In an Opinion and Order dated January 14 and filed January 15, 1981, the District Court denied all of the Defendants' motions and granted Plaintiff's

motion; and on February 12, 1981, an amended judgment was entered in the District Court awarding Plaintiff $20,360 in attorney fees, $2,798.55 as other costs, and $15,585.22 as pre-judgment interest, in addition to the damages previously awarded.

Defendants Shouldice and Linderoth filed their Notice of Appeal in the United States Court of Appeals for the Sixth Circuit on March 6, 1981; and Plaintiff moved to dismiss their appeal for lack of jurisdiction because of untimely filing.

On July 15, 1981, Plaintiff's Motion to Dismiss was denied upon an initial determination "that the motion to dismiss is frivolous and entirely without merit." On November 5, 1982, following consideration of Plaintiff's motion by the Court of Appeals panel assigned to the cause, the motion was granted and the appeal was dismissed. On January 20, 1983, the Court of Appeals granted permission to the Defendants to file a Petition for Rehearing in Excess of 15 Pages; and on March 25, 1983, the Court of Appeals entered orders granting Defendant's Petition for Rehearing and vacating its order dismissing the appeal as being untimely filed.

On April 15, 1983, the Court of Appeals entered its Opinion holding that Defendants' Notice of Appeal was timely filed, reversing the District Court's award of damages and pre-judgment interest, and affirming the District Court's award of attorney fees and costs. Its judgment was entered on April 15, 1983; and on June 20, 1983, the Court of Appeals denied Plaintiff's Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I. A Post-Judgment Motion to Award Pre-Judgment Interest On a Claim For Liquidated Damages Under 42 USC §1983 Does Not Toll the Time For Filing Notice of Appeal

In *Royal Indemnity Co* v *United States*, (1941) 313 US 289, 61 S Ct 995, 85 L Ed 1361, the Supreme Court held that where no federal statute applies to a claim for pre-judgment interest in an action for money damages, "it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage." 313 US at 296. The Court determined: "A suit upon a contractual obligation to pay money at a fixed or ascertainable time is a suit to recover damage for its breach, including both the principal amount and interest by way of damage for delay in payment of the principal after the due date." 313 US at 295-96.

In *Rodgers* v *United States*, (1947) 332 US 371, 68 S Ct 5, 92 L Ed 3, the Supreme Court found that the Agricultural Adjustment Act of 1938, 7 USC §§1981, *et seq.*, neither allowed nor prohibited pre-judgment interest upon the award of a penalty. The Court wrote: "***[O]ne for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained." 332 US at 373. The Court rejected the suggestion that 28 USC §811, the statutory predecessor of 28 USC §1961, foreclosed an award of pre-judgment interest by providing only for interest after judgment. This rule has been followed with regard to 23 USC §1961. *Casto* v *Arkansas-Louisiana Gas Co*, (CA 10, 1977) 562 F2d 622, 624; *Lodges 743 and 1746, International Association of Machinists and Aerospace Workers* v *United Aircraft Corp*, (CA2, 1975) 534 F2d 422, 446, fn.42, *cert. den.*, 429 US 825; *Louisiana & Arkansas Railway Co* v *Export Drum Co*,

(CA5, 1966) 359 F2d 311, 316-317; *Moore-McCormick Lines* v *Amirault*, (CA1, 1953) 202 F2d 893,895.

Consistent with this authority, the Sixth Circuit Court of Appeals held, in *Bituminous Casualty Corp* v *Lynn*, (CA6, 1974) 503 F2d 636 645: "The general rule is that interest, at the legal rate, runs as a matter of right on a liquidated claim." The Court went on to state: "When the amount of the claim can be readily ascertained by reference to a formula in a contract and none of the facts is in dispute or when the amount of the claim itself is not disputed, the claim is liquidated." 503 F2d at 646.

The First Circuit has allowed pre-judgment claims upon damages awarded under 42 USC §1983, but has treated the allowance of such interest as discretionary. *Heritage Homes of Attleboro, Inc* v *Seekonk Water District*, (CA1, 1981) 648 F2d 761, *vac'd on other grounds*, 454 US 807. See, also, *Furtado* v *Bishop*, (CA1, 1979) 604 F2d 80. In these cases, the First Circuit did not consider the distinction between liquidated and unliquidated claims.

Subsequently, the Sixth Circuit, too, characterized pre-judgment interest in the absence of statutory authority as discretionary without addressing the distinction between liquidated and unliquidated claims. *Bricklayers' Pension Trust Fund* v *Taiariol*, (CA6, 1982) 671 F2d 988, 990.

Following the entry of judgment in the District Court in the instant cause on September 23, 1980, Plaintiff moved for attorney fees, costs and pre-judgment interest. His motion was granted by an order entered January 15, 1981. An amended judgment was entered on February 12, 1981; and Defendants filed their Notice of Appeal in the United States Court of Appeals for the Sixth Circuit on March 6, 1981, more than 30 days following entry of the District Court's original judgment, but less than 30 days from entry of the amended judgment.

Plaintiff's motion to dismiss Defendants' appeal as untimely was initially determined to be "frivolous and entirely without merit," and was denied by order entered July 15, 1981; but by order dated November 5, 1982, following consideration by the panel to whom the appeal was assigned, Plaintiff's motion was granted and Defendnts' appeal was dismissed. However, after granting rehearing to the Defendants, the Court of Appeals vacated its Novembr 2, 1982, order and, in its subsequent Opinion, entered April 15, 1983, held that Defendants' Notice of Appeal was timely filed. 706 F2d at 746-47 The Court wrote:

> Though Stern's argument is not without force, we must reject it. This court recently held in *Bricklayers' Pension Trust Fund* v *Taiariol*, 671 F.2d 988, 990 (6th Cir. 1982), that "in the absence of a statutory provision the award of pre-judgment interest is in the discretion of the court." As a result, whether or not a claim is liquidated is inconsequential. Moreover, even were the liquidated-unliquidated distinction applicable, the *Taiariol* case involved a plaintiff's liquidated claim for money contractually owed to a pension fund. In light of this court's more recent authority, we hold that a grant of pre-judgment interest pursuant to a post-trial motion is discretionary with the trial court and requires an amendment of judgment under FRCP 59. See *Chicago & Northwestern Railway Co.* v *Union Packing Co.*, 527 F.2d 592 (8th Cir. 1976). Since defendants filed their notice of appeal within thirty days after entry of the amended judgment, this appeal is timely.
>
> 706 F2d at 747

A review of the authority cited herein, together with a review of the decisions of the Sixth Circuit Court of Appeals, discloses the existence of an important federal question which has not, but should be, settled by the Supreme Court: whether

pre-judgment interest on a claim for liquidated damages under 42 USC §1983 should be awarded as a matter of right. A similar, but different question, was decided in *White* v *New Hampshire Department of Employment Security*, (1982) 455 US 445, 102 S Ct 1162, 71 L Ed 2d 325.

At the outset it should be noted that the District Court determined Plaintiff's claim for back pay to be a liquidated claim; and that determination was not challenged on appeal. Plaintiff's request for interest was not addressed to his claims for nominal, compensatory or punitive damages, nor were compensatory or punitive damages awarded. Thus, the District Court's award of pre-judgment interest was on a claim for liquidated damages under 42 USC §1983.

The Supreme Court is urged to grant certiorari to determine whether pre-judgment interest on liquidated damage claims under 42 USC §1983 should be awarded as a matter of right on the basis of federal policy of general application or whether the award of such interest is within the discretion of the District Court on an *ad hoc* basis. If pre-judgment interest is available under FRCP 60(a), as claimed by Plaintiff, the Defendants' appeal to the Court of Appeals was untimely and should have been dismissed.

II. A Complaint For Actual Damages For Loss of Employment, Brought Under 42 USC §1983, States a Claim For Back Pay As Legal Damages

Following the second trial of this cause, the District Court entered judgment upon a jury verdict in Plaintiff's favor for nominal damages of two dollars against Defendant Linderoth and one dollar against Defendant Shouldice. The District Court's judgment also assessed $45,696, representing back pay as damages against these Defendants in their individual

capacities, and subsequently awarded $15,585.22 as pre-judgment interest on the back pay award, together with $20,360 in attorney fees and $2,798.55 as other costs.

By its decision of April 15, 1983, the United States Court of Appeals for the Sixth Circuit reversed the trial court as to the award of back pay as damages and pre-judgment interest. In doing so, the Court of Appeals wrote: "A fair reading of Stern's complaint discloses that he demanded back pay only from the College. While the term 'back pay' appears in the prayer for relief against the College, it does not appear in the claim for compensatory and punitive damages against Shouldice and Linderoth." 706 F2d at 750.

In fact, the term "back pay" does not even appear in the prayer for relief set out in Plaintiff's Complaint. Rather, Plaintiff sought reinstatement with "retroactive pay" in relation to the Defendant College.

While it was accurate for the Court of Appeals to observe that the term "back pay" does not appear in the prayer for relief by way of compensatory and punitive damages against Defendants Shouldice and Linderoth, the Court of Appeals failed to consider the language of the second paragraph of Plaintiff's prayer: "(b) That a Judgment be entered against the Defendants, THE BOARD and KENNETH SHOULDICE as an individual, jointly and severally, for $500,000.00 *actual damages, plus attorney fees, and court costs.*" [emphasis supplied] It then went on to write: "Actual damages were limited at trial to claims for expenses of seeking other employment, injury to professional reputation, stress, embarrassment and mental anguish." 706 F2d at 750.

In so stating, the Court of Appeals ignored the explicit meaning of statements made by Defendants' counsel and the District Court acknowledging Plaintiff's claim for back pay to include legal damages against the individual Defendants.

Thus, in response to Plaintiff's request to reserve "back pay" as ancillary to the equitable relief of reinstatement for determination by the District Court, Defendants' counsel responded by urging the Court to withhold from the jury any consideration of back pay as damages. Defendants' counsel recognized that if the trial court were to reserve to itself the question of back pay only in relation to Plaintiff's request for equitable relief, while allowing the jury to consider back pay as legal damages against the individual Defendants, a double recovery might occur. In such event, it might be impossible to separate from the jury's award of legal damages that portion representing back pay. Thus, the District Court was properly persuaded by Defendants' counsel that "*** it is the responsibility of the Court to consider what damages if any, by way of quote, back pay, unquote, there are to be assessed against the college and the other Defendants — and/or the other Defendant, that the traditional, common law concept of damages is stated properly in the instructions." It was with this mutual understanding that the Court proceeded to instruct the jury that their consideration of damages should focus only upon the expense of seeking other employment, stress, embarrassment, mental anguish, and injury to professional reputation.

Although back pay sought in conjunction with reinstatement is considered part of a total, equitable remedy, back pay sought from school officials in their individual capacities is legal in nature "whether it is styled as such or not." *Shirley* v *Chagrin Falls Exempted Village Schools Board of Education*, (CA 6, 1976) 521 F2d 1329, 1334, *cert. den.* 424 US 913.

The second paragraph of the prayer for relief in Plaintiff's Complaint seeking "actual damages" from Defendant Shouldice was obviously sufficient in both style and substance to include and to notify the Defendant of the inclusion of back pay as an element of legal damages. Indeed, after two trials, it

was acknowledged by counsel for the Defendants and the District Court that back pay as an element of legal damages was to be decided by the Court.

The Court of Appeals' suggestion that comments made by Plaintiff's counsel "demonstrate that Plaintiff was seeking back pay solely against the College," and that the "clear inference from this proposal is that a claim for back pay against the individual Defendants was not in the case," 706 F2d at 751, is inaccurate and unjustified. Plaintiff's suggestion that the District Court, and not the jury, determine back pay in conjunction with the equitable relief of reinstatement was not an election of remedies. That the District Court also withhold from the jury the question of back pay as legal damages was a suggestion adopted at the urging of Defendants' counsel.

The misinterpretation of fact and consequent misapplication of law reflected in the decision of the Court of Appeals arises in consequence of its consideration of an issue that was never properly raised. The District Court had properly rejected a post-trial argument that Defendants were denied their right to trial by jury on Plaintiff's legal damage claim. The argument was rejected for the reason that Defendants had never requested a jury trial and had opposed Plaintiff's request in relation to each and every issue raised. Furthermore, Defendants had stipulated that all questions concerning Plaintiff's entitlement to back pay, whether as equitable or legal relief, be determined by the District Court.

It is not without significance that the question of Eleventh Amendment immunity was raised by Defendant Lake Superior State College after the second trial of this cause had commenced. This circumstance prompted Plaintiff's counsel to urge the District Court to reserve its decision on this belatedly raised issue until after the jury returned a verdict. It was in this context that Plaintiff's counsel also requested the District

Court to reserve any questions as to what relief, if any, should be awarded against the Defendant College.

This case has now been in litigation for more than a decade. Both in 1977, after three days of trial, and in 1979, after 14 days of trial, juries found the facts to be as claimed by the Plaintiff. The legal validity of those claims has been upheld by numerous rulings in the District Court and, in major measure, by the Court of Appeals. Because of an "inference" drawn by the Court of Appeals from the words of Plaintiff's counsel, the Court of Appeals withdrew from Plaintiff the major portion of the relief that was won by his protracted and costly effort. An inference of such damning consequence should be based upon only the most compelling circumstances, and only after examining those circumstances in the full context of the situation in which they arise.

It is urged that it is a grievous miscarriage of justice to deny the relief awarded to Plaintiff in the District Court. It is urged that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceeding*** as to call for an exercise of this Court's power of supervision." Rule 17, Rules of the Supreme Court.

The Court of Appeals may have been correct in its reading of Plaintiff's Complaint as to Linderoth. It was clearly mistaken as to Plaintiff's claim against Shouldice, as demonstrated by the clear language of the second paragraph of his prayer for relief and the unequivocal acknowledgments made by counsel and the trial judge in the District Court.

CONCLUSION

For the reasons stated herein, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit in this cause.

Respectfully submitted,

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September 9, 1983

APPENDIX

Opinion on Motion for Summary Judgment

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

ROBERT STERN,
Plaintiff,

vs. No. M 43-73 CA 3

KENNETH SHOULDICE, et al,
Defendants.

OPINION ON MOTION FOR SUMMARY JUDGMENT

This action is yet another of the type now commonly referred to as *Roth-Sindermann* cases. *See Board of Regents of State Colleges* v *Roth,* 408 U.S. 564 (1972); *Perry* v *Sindermann,* 408 U.S. 593 (1972). Plaintiff, a former teacher at Lake Superior State College (hereinafter "LSSC"), claims that defendants' nonrenewal of his employment contract violated his constitutional rights under the Fourteenth Amendment. 42 U.S.C. §§1983, 1985; 28 U.S.C. §§1331, 1343(3). More specifically, plaintiff contends that his termination was in retaliation for the exercise of his First Amendment rights.[1] He also challenges the procedural aspects of his termination, claiming that he was entitled to a hearing "to prove the legitimacy of his claim to entitlement in light of the policies and practices of the institution where he had taught" (Complaint, ¶19),[2] and "to challenge the sufficiency of the grounds for his nonretention" (Complaint, ¶20). An additional generalized allegation asserts that plaintiff was "not otherwise afforded due process,

as a matter of fact, prior to being fired" (Complaint, ¶21)[3], including the opportunity to confront the witnesses against him and to cross-examine them under oath, or to present witnesses on his own behalf.[4]

Plaintiff seeks reinstatement with back pay for the period of wrongful termination, pending an administrative hearing, along with compensatory and punitive damages.

Defendants here are the president of LSSC, the chairman of LSSC's Board of Control, the chairman of the English Department at LSSC (plaintiff's most immediate superior), and LSSC itself, a state-supported institution of higher education. They are sued in both their individual and official capacities.

Defendants originally filed a motion to dismiss (for failure to state a claim upon which relief can be granted, F.R.Civ.P. 12(b)(6)) or in the alternative for summary judgment (F.R.Civ.P. 56). That motion was denied in its entirety by then-District Judge Engel (predecessor of the writer). After extensive discovery, defendants have renewed their summary judgment motion. This Court has held a hearing on this motion, and, having heard the arguments of counsel thereon and having duly considered the pleadings and other documents filed in this case, hereby announces its decision.

I

PROCEDURAL DUE PROCESS

Plaintiff claims that he was denied procedural due process in that he was not provided with a hearing prior to the defendants' action in not renewing his employment. The Fourteenth Amendment's requirements of procedural due process apply only to the deprivation of "liberty" and "property" interests. *Board of Regents of State Colleges* v *Roth*, 408 U.S. 564, 569 (1972).

A. Facts.

The following are the undisputed facts appearing in the record.

Plaintiff, a teacher of speech, drama and theater, was recruited by LSSC while on the instructional staff of Michigan State University in the spring of 1967. He was hired as an assistant professor without tenure by separate one-year appointments for the academic years of 1967-1968, 1968-1969, 1969-1970, 1970-1971, and 1971-1972.

Under LSSC procedures, an assistant professor is automatically granted tenure if reappointed after 5 years of service. Notice of termination must be given in writing before December 15 of the last academic year of employment.

Dr. Linderoth (now Chairman of the English Dept., formerly Chairman of the Division of Arts and Letters) wrote plaintiff on May 6, 1971 that he was unwilling to recommend Stern for tenure for specified reasons (primarily an inability to work with other faculty and administrative members in view of a planned liberal arts multi-disciplinary synthesis requiring much cooperation). Linderoth, on the same day, notified Dr. Light (Vice-President for Academic Affairs) of his recommendation concerning Stern.

On the next day, May 7, Light offered plaintiff the opportunity to personally discuss Linderoth's recommendation. By letter of May 10, plaintiff requested an explanation of reasons for Linderoth's recommendation. Three days later (May 13), Light wrote a memo confirming a phone call to Stern requesting that he bring to the meeting or present subsequent to it any evidence of personal capability (transcripts and status of his doctoral program), and offering plaintiff the option of bringing along a neutral observer.

After the May 13, 1971 meeting, Light wrote Dr. Shouldice (LSSC President) that plaintiff felt it difficult to submit any information until he had a more detailed list of charges from Linderoth. The latter argreed to provide such, but then plaintiff indicated that he preferred not to respond to that list because he felt it would compromise his case to divulge data that he planned to present before he had an opportunity to be heard before an impartial hearing body. Plaintiff requested a hearing before the Tenure Committee, and Light again requested Stern to supply any current information to aid Light in his recommendation to Shouldice. By letter of May 17 to Shouldice, Light concurred in Linderoth's recommendation to deny tenure to Stern. Linderoth, on May 17, wrote his promised clarification of his original letter to plaintiff. On May 18, in a letter to Shouldice, Light again concurred in Linderoth's recommendation.

Plaintiff was notified on May 19 by Shouldice that the Tenure Committee was being asked to meet in *ad hoc* capacity to review plaintiff's case (even though the Tenure Committee usually reviews only matters affecting the status of tenured faculty), and Shouldice promised to withhold further action on his decision until receiving the Committee's report. The Tenure Committee hearing was held on May 24, 1971, and by letter of June 3, 1971, the Committee concluded that "there is an irrevocable conflict between Division Chairman Linderoth and Professor Stern; and the reasons given for Professor Stern's non-reappointment have not been wholly refuted."

One June 11, Shouldice advised plaintiff of his decision not to recommend him for tenure, which also meant that his employment would terminate at the end of the 1971-1972 academic year. Plaintiff sent Shouldice a letter on June 17 requesting further clarification of the latter's June 11 letter. Shouldice responded on June 22 and again on July 15.

At its August 13, 1971 meeting, the Board of Control of LSSC considered the change of status recommendation regarding Stern and approved the action recommended. On September 16, plaintiff and his attorney requested of Shouldice an opportunity to make a presentation to the Board of Control pursuant to Article I, Section 1.11 of the Board's Bylaws and Statutes. Plaintiff on October 4 requested an opportunity to make a presentation at the October 15 meeting. Shouldice advised plaintiff's attorney on October 9 that the Board's Bylaws required such material to be submitted at least 10 days in advance of a regular meeting.

On October 12, plaintiff's attorney wrote to the Chairman of the Board of Control seeking to make a presentation to the October 15 Board meeting. The Board Chairman asked plaintiff's attorney to follow the Board's established procedures for presentation of material to the Board, which the attorney then agreed to do.

Plaintiff submitted a written document to the Board on November 5, in anticipation of their scheduled meeting for November 19. A revised version was submitted on November 13, entitled "Should the Board of Control of LSSC Modify the Decision to Fire Robert Stern." It consisted of 10 pages of text and 28 pages of exhibits. The minutes of the November 19 Board meeting reflect that plaintiff's attorney declined an opportunity to present any additional information. Mr. Clevenger, attorney for the Board of Control, was asked to explain the procedures involved, and he presented a chronology of events roughly corresponding to the above recitation. The Board then voted to reaffirm its previous (August 15, 1971) action in this matter.

B. Property

Roth contains an extensive discussion of the "property" concept.

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits . . . .

To have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . .

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Id.* at 576-77.

In that case, the terms of the teacher's employment contract afforded him no interest in re-employment for the next year. Nor did any state statute or University rule or policy secure to him an interest in re-employment. Therefore, Roth, a non-tenured teacher, had no "property" interest protected by procedural due process (a statement of reasons and a hearing), even though he surely had an abstract (and realistic) concern in being rehired.

The companion case of *Perry* v *Sindermann*, 408 U.S. 593 (1972), elaborated on certain aspects of "property" interests. The Supreme Court refined the notion that might have been implied by *Roth*, namely, that lack of a formal contractual or tenure security in continued employment completely disposes of procedural due process claims. The teacher in *Sindermann* had alleged that his interest in continued employment (a "property" interest), though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration. He claimed the college had a *de facto* tenure program, based on a provision

in the College's Faculty Guide and certain guidelines promulgated by the Coordinating Board of the Texas College and University System. The Court wrote:

> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit . . . .
>
> Yet absence of . . . an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in re-employment . . . . [T]he law of contracts . . . long has employed a process by which agreements, thorugh not formalized in writing, may be 'implied.' . . . Explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' . . .
>
> A teacher . . . who has held his position for a number of years, *might* be able to show from the circumstances of this service — and from other relevant facts — that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a 'common law of a particular industry or of a particular plant' that may supplement a collective-bargaining agreement, . . . so there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university . . . that has *no explicit tenure system* even for senior members of its faculty, but that nonetheless may have created such a system in practice." *Id.* at 601-02 (emphasis added).

With these principles in mind, this Court must now look to the specifics of plaintiff's claims. Stern has devoted six paragraphs of the complaint (¶¶8-13) to "bases of entitlement

to continued employment." He alleges (1) that President Shouldice induced him and his family to relocate to LSSC upon representations that the offered position was permanent rather than temporary; (2) that it has been the custom and practice of LSSC not to enter into a detailed written faculty employment contract, which purports to exhaustively set forth all of the terms of the contract, and that the only writing is a letter of appointment; (3) that LSSC's regulations purport to encourage long-term faculty employment, and that the custom and practice of LSSC has been in the case of one recruited for long-term employment, such person's employment will not be terminated until or unless Shouldice decides that it will be terminated; (4) that he had faithfully performed his duties, and also had created, produced and directed plays outside of the LSSC community in such a manner so as to bring praise and recognition to LSSC, including approbation from Shouldice; and (5) that he had met LSSC's explicitly stated standards for promotion and tenure, not to mention continued employment which includes, but is not limited to, his obtaining his Ph.D. degree during his employment at LSSC.

Initially, this Court observes that Stern was employed as a non-tenured assistant professor on a series of five one-year contracts. The portions of the Faculty Manuals in effect both when Stern was first hired and when his contract was not renewed make clear that non-tenured appointments are for the limited duration of one year. Stern has contended that the letter of appointment doesn't exhaustively constitute his contract with LSSC, and that it has been the custom and practice of LSSC not to enter into a detailed written faculty employment contract. The Court concludes, however, that this particular point did not prevent the Supreme Court from deciding that the non-tenured teacher had no property interest in continued employment. *See Board of Regents of State Col-*

leges v *Roth*, supra, at 566 n.1 ("The respondent had no contract of employment. Rather, his formal notice of appointment was the equivalent of an employment contract . . . ."). Plaintiff has not adduced any evidence to support his allegation that LSSC's custom and practice has been to provide additional unwritten conditions of employment, outside the letter of appointment (especially any dealing with the tenure concept). The Court finds that under the *Roth* guidelines, Stern possesses no property interest protected by due process.

Even though a non-tenured professor, at the time he was hired by the university, might be informed that he could eventually expect tenure if he met certain standards of professional competence, this fact does not give him a property interest in continued employment sufficient to require the procedural protections of the Fourteenth Amendment. Such notice is no doubt true of most neophyte members of university faculties. *Stebbins* v *Weaver*, 537 F.2d 939, 942 (7th Cir. 1976); cert. denied, 45 U.S.L.W. 3463 (1977).

Stern has also claimed that he has met LSSC's explicitly stated standards for promotion and tenure. However, it is clear that meeting any such published standards does not confer a property interest in advancement or continued employment, in the absence of some particular institutional regulation guaranteeing reemployment. *Burdeau* v *Trustees of California State Colleges*, 507 F.2d 770, 774 (9th Cir. 1974), cert. denied, 423 U.S. 989 (1975).

> "Until tenure is obtained he may equal or exceed minimum requirements for evaluation and still the school may prefer to employ someone else for the position he seeks." *Id.* at 744.

No such guarantee of reemployment in this case has been revealed. *See* Faculty Manual (1968) at F-3; Faculty Policies

Manual (1970) at 11-12. The fact that some or most teachers who are hired on a year to year basis are generally rehired does not give rise to a right of reemployment. *Poddar* v *Youngstown State University*, 480 F.2d 192, 194 (6th Cir. 1973).

Plaintiff has also raised the issue of so-called "implied" or *de facto* tenure from *Sindermann*. That, however, is a heavy burden to meet. An explicit tenure system, as is the case at LSSC, weighs heavily against finding unwritten "rules" for governing employment. *Ryan* v *Aurora City Board of Education*, 540 F.2d 222, 227 and n.4 (6th Cir. 1976), cert. denied, 45 U.S.L.W. 3463 (1977); *Cotten* v *Board of Regents of University System of Georgia*, 395 F. Supp. 388, 393 (S.D. Ga. 1974), aff'd 515 F.2d 1098 (5th Cir. 1975); *Megill* v *Board of Regents of State of Florida*, 541 F.2d 1073, 1078 (5th Cir. 1976). *Cf. Soni* v *Board of Trustees of University of Tennessee*, 513 F.2d 347, 351 (6th Cir. 1975), cert. denied, _____ U.S. _____, 96 S.Ct. 2623 (1976); *Watts* v *Board of Curators, University of Missouri*, 363 F. Supp. 883, 888 (W.D.Mo. 1973), aff'd, 495 F.2d 384 (8th Cir. 1974); *Toney* v *Reagan*, 326 F. Supp. 1093, 1096 (N.D. Cal. 1971), aff'd, 467 F.2d 953 (9th Cir. 1972), cert. denied, 409 U.S. 1130 (1973) and the statement from *Sindermann* set forth hereinabove. Plaintiff has shown this Court nothing factual (and defendants' materials in the record virtually preclude any such showing) to support a claim of "implied" or *de facto* tenure that is necessary under *Sindermann*. At most, the evidence indicates a unilateral expectancy, which does not constitute a property interest in the constitutional sense. The facts here are distinctly different from *Soni* v *Board of Trustees of University of Tennessee*, 513 F.2d 347 (6th Cir. 1975), aff'g 376 F. Supp. 289 (E.D. Tenn. 1974), cert. denied, _____ U.S. _____, 96 S.Ct. 2623 (1976), where the court found that the university *objectively* acted toward the professor in such a manner as to reasonably lead him to believe that he was a person

with a relative degree of permanency, despite his being formally nontenured. Thus, plaintiff has not and cannot prevail on any claim of entitlement to a property interest under principles stated in *Sindermann*.

C. Liberty.

Roth also discussed the liberty interests protected by procedural due process.

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'" . . . In such a case, due process would accord an opportunity to refute the charge before University officials . . . .
>
> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities . . . .
>
> It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another . . . ." *Id.* at 573-575.

These principles have been amplified in subsequent cases.

> "In *Weathers [v. West Yuma County School District R-J-1*, 530 F.2d 1335 (10th Cir. 1976)] we held that even should the fact of nonrenewal and the reasons therefor be communicated, thus making the teacher 'less attractive' to future

employers, that this simply does not establish a liberty interest. We quoted with approval this language from *Gray* v *Union County Intermediate Education District*, 520 F.2d 803 (9th Cir. 1975):

> 'Nearly any reason assigned for dismissal is likely to be to some extent a negative reflection on an individual's ability, temperament or character (citation omitted). But not every dismissal assumes a constitutional magnitude. The concern is only with the type of stigma that seriously damages an individual's ability to take advantage of other employment opportunities (citation omitted).' 520 F.2d at 806.''

Powers v *Mancos School District RE-6, Montezuma County, Colorado*, 539 F.2d 38, 42-43 (10th Cir. 1976).

Similarly, in *Blair* v *Board of Regents of State University and Community College System of Tennessee*, 496 F.2d 322 6th Cir 1974), the Court stated:

> ''The District Court . . . found that, under the rationale of *Roth*, appellee was deprived of a 'liberty' interest under the Fourteenth Amendment, in that the non-renewal of his contract, on the charge of failure to meet minimum standards in his professional relationships with individual students, seriously damaged his reputation or imposed on him a stigma that foreclosed his freedom to take advantage of other employment opportunities. We do not construe *Roth* to support this conclusion. It can be argued that the failure of any school system to renew the contract of any teacher on grounds of failure to meet minimum standards in his relationships with students may injure the reputation of the teacher in the academic community. We do not read *Roth* to mean that this situa-

tion requires a hearing under due Process Clause." *Id.* at 324.

The Sixth Circuit again discussed the liberty concept in *Lake Michigan College Federation of Teachers* v *Lake Michigan Community College*, 518 F.2d 1091 (6th Cir 1975), cert. denied, _____ U.S. _____, 96 S.Ct. 3189 (1976):

> "Thus it appears that due process safeguards would apply if the discharge of a teacher foreclosed future employment opportunities that otherwise would be open to him or if the grounds for the discharge tend to discredit the teacher's honesty or integrity or to damage his standing in the community. The federal courts have had many opportunities to refine and to apply the general guidelines set forth in *Roth*. For example, liberty interests are not implicated when a teacher is charged with failure to meet minimum standards in his professional relationship with students. [citing *Blair*, supra.] Similarly, allegations of improper or inadequate performance do not constitute a deprivation of liberty within the meaning of the fourteenth amendment. [citation omitted] It has been held that in certain circumstances even the charge of 'incompetence, neglect of duty and malfeasance in office' does not amount to a deprivation of liberty under *Roth*. [citation omitted]" *Id.* at 1096-1097.

There is no evidence to support the allegation that there has been *public* disclosure of the reasons for the denial of tenure to the plaintiff and non-renewal of his contract. *Cf. Bishop* v *Wood*, _____ U.S. _____, 96 S.Ct. 2074, 2079-80 (1976) (even if the reasons are false); *Stebbins* v *Weaver*, 537 F.2d 959, 942 (7th Cir. 1976), cert. denied, 45 U.S.L.W. 3463 (1977); *Ortwein* v *Mackey*, 511 F.2d 696, 699 (5th Cir. 1975); *Kaprelian* v *Texas Woman's University*, 509 F.2d 133, 137 (5th Cir. 1975);

Haron v *Board of Education of City of New York*, 411 F. Supp. 68, 71 (E.D.N.Y. 1976); *Griffin* v *Lancaster*, 400 F. Supp. 421, 423 (W.D. La. 1975). The charges creating stigma must be considerably graver than mere charges of improper or inadequate job performance, or of failure to meet minimum standards of professional conduct, and must involve imputation of illegal, dishonest or immoral conduct calling into question one's good name, honor or integrity. *Connealy* v *Walsh*, 412 F. Supp. 146, 159 (W.D. Mo. 1976). Denial of tenure because of poor or non-excellent professional performance is not a badge of infamy. *Keddie* v *Pennsylvania State University*, 412 F. Supp. 1264, 1273-74 (M.D. Pa. 1976).

Plaintiff claims that his "dismissal" has been harmful in terms of finding future employment, and that he has thus been foreclosed from taking advantage of other employment opportunities by a stigma or other disability. In *Roth* the Supreme Court, in an important footnote, discussed this issue:

> The District Court made an assumption "that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career." 310 F. Supp , at 979. And the Court of Appeals based its affirmance of the summary judgment largely on the premise that "the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor" amounts to a limitation on future employment opportunities sufficient to invoke procedural due process guarantees. 446 F.2d, at 809. But even assuming, *arguendo*, that such a "substantial adverse effect" under these circumstances would constitute a state-imposed restriction on liberty, the record contains no support for these assumptions. There is no suggestion of how nonretention might affect the respondent's future employment prospects. Mere proof, for

> example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of "liberty." Cf. *Schware* v *Board of Bar Examiners*, 353 U.S. 232.
> 408 U.S. at 574 n. 13.

While school officials may not deny a range of opportunities in a manner that denies the right to due process, this does not mean that they have a positive duty to determine whether the job market can absorb the professor; the borderland of liberty does not stretch that far; as long as the opportunity to pursue new employment persists, the school has not abridged the professor's liberty. *Perkins* v *Regents of University of California*, 353 F. Supp. 618, 623-24 (C.D. Cal. 1973).

Although plaintiff maintains that the deposition testimony of Creigton Holden (Clerk's Item #44), a member of the LSSC Board of Control, shows that Stern's nonretention by the college was a "black-ball" (and for all practical purposes an exclusion for future academic employment), an inspection of the questions and answers[5] do not yield any reasonable basis for such a strong interpretation. They are merely assumptions, unsupported by an facts. *Accord, Burdeau* v *Trustees of California State Colleges*, 507 F.2d 770, 773 (9th Cir. 1974), cert. denied, 423 U.S. 989 (1975) ("Appellant's assumption that a 'no-reason' non-retention is subject to derogatory interpretation by third parties is an assumption not supported by any fact.").

To generally interpret a non-retention as plaintiff argues would be to give with one hand what the other hand has taken away, and would make shambles of *Roth*. If a teacher is not tenured (formally or impliedly), he does not have a constitutionally protected property interest, and therefore has no right

to a prior hearing. To construe such a non-retention of a non-tenured teacher as inevitably constituting a foreclosure of future employment opportunities (implicating a liberty interest) thereby requiring a prior hearing, would be inconsistent with the property interest analysis. Difficulty in obtaining new employment does not constitute a stigma nor does it automatically result from the mere fact of not being rehired in a prior job. The national economic picture (inflation and unemployment rates) has a very significant impact on finding new employment. In any event, the Supreme Court has indicated that the mere record of nonretention in one job, *although making one somewhat less attractive to some other employers*, does not establish the kind of foreclosure of opportunities amounting to a deprivation of liberty. *Roth*, supra, at 574 n. 13. The Supreme Court was even more emphatic when it said:

> "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."

In all materials submitted to the Court for consideration on this summary judgment motion, there is no evidence to support the claim that any constitutionally protected liberty interest of the plaintiff was infringed by the defendants.

The conclusion that plaintiff had neither a property nor a liberty interest at stake in the circumstances of this case means that he was not entitled to any constitutional due process protections, namely, a statement of reasons for nonretention and prior hearing. The record in this case, however, indicates that plaintiff was afforded very substantial procedural protections. There is a large amount of correspondence between plaintiff and Linderoth, Light, and Shouldice detailing reasons for non-retention. Plaintiff had a meeting with Light, the vice-president for academic affairs, at which he was given the opportunity to present any information that he wanted.

Shouldice convened the Committee on Academic Tenure in an *ad hoc* capacity, since it did not have an official function in personnel matters concerning nontenured faculty members. This committee held a hearing at which plaintiff was present, and sent its report to President Shouldice. The Board of Control permitted plaintiff to make a written submission to is as well as an oral presentation at a regular meeting. These opportunities extended to plaintiff were far more than were owed to him by LSSC, either as a constitutional matter or as a matter of the institution's own regulations and practices.

As we have found that plaintiff had no constitutional right entitling him to procedural due process, there is no right to substantive due process, that is, to challenge the action as being arbitrary or capricious. *Stebbins* v *Weaver*, 537 F.2d 939, 942 (7th Cir. 1976), cert. denied, 45 U.S.L.W. 3463 (1977); *Jeffries* v *Turkey Run Consolicated School District*, 492 F.2d 1, 4 (7th Cir. 1974); *Williams* v *Day*, 412 F. Supp. 336, 347 (E.D. Ark. 1976). The federal courts are not proper forums for contesting (nor does the due process clause of the Fourteenth Amendment provide a guarantee against) even incorrect or ill-advised personnel decisions by public employers. *Bishop* v *Wood*, ____U.S.____, 96 S.Ct. 2074, 2080 (1976).[6]

The Court recognizes that the present motion is one for summary judgment, which is not to be granted unless there is no genuine issue as to the material facts, and one party is entitled to a judgment as a matter of law. F.R. Civ.P. 56(c). The Court has read all sixteen (16) of the depositions filed in this case, all of the affidavits filed and has considered those documentary submissions which had been authenticated and would be admissible at trial.[7] The Court is convinced that the evidence brought forth is conclusive on certain of the issues raised by the pleadings. The plaintiff as the non-moving party is not entitled to hold back his evidence until trial, and is not

entitled to a trial on the possibility that an issue of material fact might turn up at the trial. 6 Pt. 2 Moore's Federal Practice ¶56.22[2] at 56-1339 to -1340, and cases cited at nn. 20-21; *id.* ¶56.23 at 56-1391 and nn. 39-40. The Court is of the opinion that defendants, as the moving party, have discharged their burden under F.R.Civ.P. 56, and hereby makes the following findings of fact and conclusions of laws.

Findings of Fact:

1. Plaintiff Robert Stern held a succession of five (5) one-year appointments to the faculty of Lake Superior State College covering the period of July 1, 1967 through June 30, 1972.

2. Under the tenure program established by LSSC's regulations and Faculty Handbook, plaintiff did not have tenure.

3. Plaintiff did not have implied or *de facto* tenure under any unwritten customs and practices outside of the formal tenure program at LSSC.

4. Defendants did not make any charges against plaintiff that might seriously damage his standing and associations in his community.

5. Disclosure of the defendants' reasons for nonretention of the plaintiff were made *privately* to him in letters during May and June 1971. As far as the evidence adduced here indicates, any *public* disclosure of the reasons were at plaintiff's behest, and are therefore his responsibility.[8]

6. Defendants did not, by declining to re-employ the plaintiff, impose on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.

Conclusions of Law:

1. Plaintiff does not have a constitutionally protected property interest in continued employment at LSSC.

2. Plaintiff was not deprived of any constitutionally protected liberty interest.

3. Since no constitutionally protected property or liberty interests of the plaintiff were implicated in this case, he was not entitled to any of the procedural protections of the due process clause of the Fourteenth Amendment.

Accordingly, defendants' motion for summary judgment as to these claims is GRANTED.

II

FIRST AMENDMENT

Plaintiff has claimed that the non-renewal of his employment contract at LSSC was in retaliation for his exercise of his First Amendment rights of Free speech. He has called attention to two series of events in particular, the "AAUP Letter" (American Association of University Professors) and the so-called "Freedman incident." The first of these occurred between December 1969 and February 1970, and the latter set of events transpired between July and October 1970. Because of our disposition of defendants' summary judgment motion as to these claims (set forth below), it is unnecessary to go into factual detail about the events.

A teacher (or other government employee) may not be terminated or denied re-employment because of his exercise of constitutional rights. *Perry* v *Sindermann*, 408 U.S. 593, 597 (1972); *Pickering* v *Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563, 568 (1968); *Amburgey* v *Cassady*, 507 F.2d 728, 730 (6th Cir. 1974); *Manchester* v *Lewis*, 507 F.2d 289, 290 (6th Cir. 1974); *Hetrick* v *Martin*, 480 F.2d 705, 708 (6th Cir. 1972), cert. denied, 414

U.S. 1075 (1973); *Orr* v *Trinter*, 444 F.2d 128, 134 (6th Cir. 1971), cert. denied, 408 U.S. 943 (1972). This is so irrespective of any contractual or tenure right to re-employment (or lack thereof). *Perry* v *Sindermann*, 408 U.S. at 596-98; *Bertot* v *School District No. 1, Albany County, Wyoming*, 522 F.2d 1171, 1177 (10th Cir. 1975).

Pickering v *Board of Education*, supra, is the most instructive Supreme Court opinion on First Amendment rights in the context of public employment, especially teaching.

> "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568.

Before engaging in the balancing approach suggested in *Pickering*, it must first be shown that the teacher's activities are in fact protected by the First Amendment. *Pickering* held that a teacher's public criticism of his superiors on "matters of public concern" may be constitutionally protected. *Amburgey* v *Cassady*, supra, held that, although a teacher has a right to criticize internal school operations, the teacher's conduct, particularly her disruption of a colleague's classroom, her shoving of the superintendent, and her suggestion that he ought to be shot, were not protected by the First Amendment, and provided ample justification for the recommendation of the superintendent and for the decision of the school board not to rehire her.

In *Manchester* v *Lewis*, supra, the Court agreed with the lower court's finding that the reason why the teacher was not given tenure was the unsatisfactory level of his teaching performance, and not, as the teacher had alleged, because of his participation in the school visiting speaker program and his public comments criticing the school's policy concerning visiting speakers. In *Hetrick* v *Martin*, supra, the Court held that a state university may discharge a teacher whose pedagogical style and philosophy did not conform to the pattern prescribed by the school administration. The teacher had claimed that she had not been rehired because she had made in-class statements about the Vietnam war and the military draft and because of her beliefs and ideas (all of which are at least arguably protected by the First Amendment).

> "Whatever may be the ultimate scope of the amorphous 'academic freedom' guaranteed to our Nation's teachers and students, . . . it does not encompass the right of a nontenured teacher to have her teaching style insulated from review by her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere within the teaching profession." 480 F.2d at 709.

In this connection, we find the following statement germane:

> Federal courts must be vigilant to protect the First Amendment rights of all of our citizens. But they must also be careful not to permit the use of speech to become a cloak for protection against the consequences of one's misconduct or incompetency. In every teacher dismissal or nonrenewal case, elements of speech may be involved. The Court's obligation is to determine from all the evidence if the

> board's decision was based in whole or in part on the teacher's exercise of his First Amendment rights. In other words, the Court must determine the *real* reason for the board's action. *See, e. g., Miller* v *Pulaski County Special School District*, No. LR-72-C-249 (E.D.Ark.), aff'd 513 F.2d 637. The burden is on the teacher to show that the stated reasons for nonrenewal were pretexts, and that the actual reason was the exercise by the teacher of a constitutionally protected right. *Watts* v *Board*, 495 F.2d 384 (8th Cir. 1974).
>
> *Williams* v *Day*, 412 F. Supp. 336, 340 n. 1 (E.D. Ark. (1976).

While the historical facts (what happened and when) of the events involved here are not disputed, the primary issue in this First Amendment retaliation claim is the real reason for the defendants' action in not renewing plaintiff's contract (the why). As a general proposition, summary judgment is likely to be inappropriate when issues of motive, intent, and other subjective feelings and reactions are material. 6 Pt. 2 Moore's Federal Practice ¶56.17[41.-1] at 56-930. In *George* v *Conneaut Board of Education, Conneau City School District*, 472 F.2d 132 (6th Cir. 1972), the Court reversed a summary judgment in favor of the defendants. The complaint alleged that the plaintiff, a nontenured teacher, was not rehired because of his exercising First Amendment rights, and defendant school board's affidavit averred that the reasons for not rehiring related solely to job performance and not to the teacher's membership in and activities on behalf of the educational association. The Sixth Circuit held that factual issues were thereby raised, (namely, whether the failure of the board to renew the teacher's contract was because of his exercise of First Amendment rights) which precluded summary judgment.

George is quite similar to the instant case. This Court again observes that it has reviewed all sixteen of the depositions in this case, the exhibits and the proposed statements of facts by both sides. Since the plaintiff's activities, which he claims are the real basis upon which he was not rehired, are not clearly *outside* of the First Amendment's protection (nor do defendants so contend), the Court will assume, for the purposes of this motion only, that they are so protected. While the defendants, in support of their motion, rely heavily on the timing of certain events (which is not disputed by plaintiff) to prove their lack of an impermissible motive for not renewing the plaintiff's contract, the Court is of the opinion that the question of motive in this situation is one of inference from the established facts of the events involved.[9] It is not the Court's function, on a motion for summary judgment, to make inferences from even undisputed facts unless the evidence is so one-sided as not to provide a reasonable basis for the opposite conclusion. We conclude that this case does not fall within this exception, but rather that the evidence submitted can reasonably support opposing inferences. Since this is the case, the defendants have not met their burden as moving parties to establish the absence of any genuine issue as to all the material facts. A genuine issue as to a material fact does exist. Accordingly, defendants' motion for summary judgment is DENIED as to plaintiff's claim of retaliation for the exercise of his constitutional rights.

To repeat this Court's ruling at the time of oral argument, defendants' motion for withdrawal of plaintiff's counsel is GRANTED for the reasons specified in the motion, primarily Disciplinary Rule 5-102 of the Code of Professional Responsibility. Plaintiff's counsel, Mr. Dunchock, advised the Court during argument on the withdrawal motion that he had made arrangements for new counsel to take his place if withdrawal was ordered. He also indicated that this new counsel might

want to amend the complaint. This Court is of the opinion that the case is at such a stage that there is no absolute right to have new counsel add new claims. The Court will require good cause for any amendments at this late date. Therefore, plaintiff's new counsel will, if he desires to amend the complaint, submit to the Court, within 21 days from issuance of this opinion, any proposed amendments accompanied by reasons in support thereof.

At the hearing on these motions, the Court also raised the issue of whether plaintiff has a right to a jury trial on the issues that might remain after disposition of the summary judgment motion. Plaintiff had filed a timely jury demand. Neither counsel was prepared for this question at that time, and the Court therefore invites memoranda from the parties to be submitted to the Court according to the following time schedule: plaintiff has twenty-one (21) days from issuance of this opinion, and defendants have fourteen (14) days from the date plaintiff's memorandum is sent to them. The Court does *not* contemplate oral argument on this point.

In summary, then, defendants' motion for summary judgment is GRANTED with respect to the procedural due process claims of the plaintiff, and plaintiff's complaint is DISMISSED as to those issues. Defendants' motion for summary judgment is DENIED with respect to plaintiff's First Amendment claims. Defendant's motion to compel withdrawal of plaintiff's counsel is GRANTED.

IT IS SO ORDERED.

/s/ WENDELL A. MILES

Wendell A. Miles, District Judge

Dated: January 31, 1977

FOOTNOTES

1. Plaintiff has pleaded a cause of action under 42 U.S.C. §1985, apparently subsection (3), alleging a conspiracy to deprive him of his civil rights. However, this provision is limited to situations with some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. *Crabtree* v *Brennan*, 446 F.2d 480, 481 (6th Cir. 1972), citing *Griffin* v *Breckenridge*, 403 U.S. 88, 101-102 (1971). As there is no allegation of this type in the complaint, nor does it appear to the Court that any such allegation could be supported by any evidence, plaintiff's claim under 42 U.S.C. §1985(3) is DISMISSED.

2. Plaintiff has apparently lifted this language from the *Sindermann* opinion. *See* 408 U.S. at 603. However, a careful reading of that portion of the opinion indicates that such a hearing ("an opportunity to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution'") was not one for the educational institution to conduct. While the Supreme Court said that the teacher "must be given" such an opportunity, the context of this statement must be examined in order to clarify its meaning. The District Court had granted summary judgment in favor of the institution. The Court of Appeals reversed, holding in part that the teacher's lack of tenure did not deprive him of an opportunity for a hearing if he could show an "expectancy" of re-employment. The Supreme Court affirmed the Court of Appeals' result, but disagreed with its reasoning. Mr. Justice Stewart wrote:

> "[w]e disagree with the Court of Appeals insofar as it held that a mere subjective 'expectancy' is protected by procedural due process." 408 U.S. at 603.

The Supreme Court did agree with the disposition to remand the case to the District Court, where the teacher would be given the opportunity to pursue his allegation that the college had a *de facto* tenure policy, and that he qualified [PRINTER CANNOT READ TOP LINE OF PAGE -24-] judgment against the teacher on the ground that he was non-tenured had foreclosed him from presenting any evidence on this issue. Thus it is clear that the District Court, and not the college, is the site for this particular "hearing." The hearing that is an element of procedural due process, where a teacher is permitted to respond to the statement of reasons for nonretention (see ¶20 of Complaint), is what is conducted by the college. In addition, the Supreme Court did not, and indeed cannot, remand to the college for the holding of such a hearing as plaintiff herein seeks; the Court can only remand to lower courts. In *Sindermann*. it is obvious that the Court was providing the teacher with an opportunity to pursue his claim of *de facto* tenure *in court. See Sindermann*, 408 U.S. at 602 n. 7 ("[w]e do not now hold that the respondent has any such legitimate claim of entitlement to job tenure . . . If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated."). *Sindermann* did not conclude that the teacher had proved his claim of implied tenure, only that he had an opportunity to show such in court. Thus, plaintiff's contention that he was entitled as a matter of procedural due process to a college-level hearing on the legitimacy of his claim of entitlement to implied or *de facto* tenure is without merit.

3. Plaintiff has contended that the Board of Control members did not know what consequences their August 13, 1971 vote on plaintiff's change-of-status recommendation would have.

The change-of-status recommendation form itself proves otherwise. The written minutes state:

> "Mr. Somes, seconded by Mr. Glass, moved approval of a change of status for Robert I. Stern, from director of drama and assistant professor of speech, to assistant professor of speech. The change of status carries no tenure, with termination of employment at the end of the 1971-72 school year. Carried by voice vote, without dissent."

Apparently the second last sentence of the above was not part of the oral proceedings at the August 1971 Board meeting. The undisputed deposition testimony of Frank Hoholik (pp. 7-11, Clerk's Item #39) and John Matheson (pp. 5-8, Clerk's Item #40) shows that the Board of Control members were sent the entire change-of-status recommendation forms a week prior to the official meeting, in order to familiarize them with details of the proposed changes and reasons therefor. Plaintiff's claim of a discrepancy between the written minutes of that Board meeting and a tape recording of the actual oral proceedings does not present any basis for relief. The record is clear that the customary procedure of the Board of Control at their regular meeting in acting upon personnel changes of status is to have an oral motion as to each individual on the agenda, but not to recite in the motion, every detail of the change-of-status recommendation forms, which are in front of each board member during the voting. This "shorthand" procedure is probably essential to having the Board complete its entire agenda for the meeting. Plaintiff's claim that this discrepancy constitutes a "fraud upon the public" is a baseless accusation. The Court knows of no legal requirement that the minutes of a Board of Control meeting be *verbatim* records of every word that was uttered at a meeting; they are usually considered a summary of action taken. The written

documents supplementing the official agenda constitute the basis or content of the official action which is recorded in the minutes. Any contention that the Board action was invalid because the oral motion did not fully refer to every item of information in the change-of-status recommendation is frivolous. In any event, this type of claim is not cognizable in federal court in a suit under 42 U.S.C. §1983, for deprivation of constitutional rights.

4. Plaintiff makes two other subsidiary claims: (1) that his "firing" was contrary to the best interest of LSSC, since a replacement for him had not yet been found, resulting in the curtailment in scope and quantity of speech/drama/theatre courses and activities offered by LSSC to its students; and (2) that the decision to "fire" him was made by defendant Shouldice, LSSC President, rather than by the Board of Control, in violation of state law. *See* M.S.A. §15.1852(104); M.C.L.A. §390.394.

As to (1), such a claim is not cognizable either in this type of suit (one for the deprivation of constitutional rights) or by courts in general. There is absolutely no support for an assertion that the best interests of an educational institution can be asserted by this plaintiff as being one of his constitutional rights. Additionally, in our governmental system of separation of powers, courts do not function in quasi-executive or administrative capacities. Our task in a §1983 case is to determine if a plaintiff's *constitutional rights* were violated, and not to govern a college.

> "The determination as to whether the quality of services of a particular teacher entitles him to continued employment beyond the probationary period, thereby qualifying him for tenure status, or whether his contract of employment should not be renewed prior to attainment of tenure status, is the prerogative of the

employer . . . *Orr* v *Trinter*, 444 F.2d 128, 135 (6th Cir. 1971), cert. denied, 408 U.S. 943 (1972).

As to (2), this claim is frivolous and is not cognizable in a §1983 proceeding. *See* Michigan Constitution 1963, Article 8, §6 (providing for educational institution governing boards to elect presidents to serve as the institution's principal executive officer); Bylaws and Statutes of the Board of Control of Lake Superior State College, Article II, Section 2.01 (specifying the president's powers). Further, there is absolutely no possible dispute with the fact that the Board of Control actually voted (on two separate occasions) on the personnel action involving plaintiff Stern. This is *not* a case presenting an issue of whether the president can unilaterally and without Board of Control approval fire or not rehire a faculty or staff member.

5. "Q. Did you at that time or did [sic] you now understand that this is an effective black-balling of a man's career for the rest of his life?

A. I don't interpret it as such but I know there are people who do.

* * *

Q. Who do you know that interprets it as such?

A. I don't know. I'm just telling — I don't.

Q. You indicated you knew that there were people who do.

A. I assume that there are people who do."

Deposition of Creighton Holden, p. 7.

6. Chief Justice Burger's suggestion in his concurring opinion in both *Board of Regents of State Colleges* v *Roth*, 408 U.S. 564 (1972) and *Perry* v *Sindermann*, 408 U.S. 593 (1972), that state courts should be considered a more siutable forum for this type of litigation is most sensible. *See* 408 U.S. at 603-604.

7. With over 770 *civil* cases the mass of materials inundated this Court is so great that weekends and one day docket clearances have been utilized to accomplish this feat.

8. The general confusion concerning the exhausting hearings and re-hearings is understandable. The writer served as a college counsel and was often perplexed by reason of conflicting statements emanating from the Courts. The only possible solution was to conduct hearings to the point that each judicial viewpoint could and should be satisfied.

9. The Supreme Court has just issued an opinion concerning the burden of proof in First Amendment retaliation cases. *See Mt. Healthy City School District Board of Education* v *Doyle*, ____ U.S. ____, 45 U.S.L.W. 4079 (January 11, 1977).

Opinion

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

ROBERT STERN,
Plaintiff,

vs.

KENNETH SHOULDICE, individually and as President of Lake Superior State College, et al,
Defendants.

No. M 43-73
CA 3

OPINION

This is a faculty tenure case brought under 22 U.S.C. §1983 and 42 U.S.C. §1985. Plaintiff alleges that his employment with Lake Superior State College was terminated in retaliation for exercise of first amendment rights. In an earlier opinion, this Court dismissed plaintiff's procedural due process claims. In that opinion the Court raised the issue whether the remaining matters were properly triable to a jury, which has been demanded by plaintiff.

The right to a jury trial lies only for "suits at common law." U.S. Const. amend. VIII. Although the basic thrust of the seventh amendment was to preserve the right to a jury trial as it existed in 1791, the concept "common law" has evolved to embrace all suits not within equity or admiralty jurisdiction. *Curtis* v *Loether*, 415 U.S. 189, 193 (1974). As a result, the right to a jury trial may extend to congressionally-created causes of action. *Id.* at 193-94. When a statutory cause of action comes

before a court, it must be carefully analyzed to determine whether the issues raised are inherently legal or inherently equitable. *Where distinct legal and equitable issues are involved, there may be a right to a jury on the legal issues, while the equitable issues are solely for the court. Dairy Queen, Inc.* v *Wood*, 369 U.S. 469 (1962).

There are three essential facets to the determination whether a jury trial is appropriate. First, it must be determined whether the relief sought is "legal" or "equitable." Secondly, it must be determined whether the issues are within the practical abilities and limitations of a jury. *See Dairy Queen, Inc.* v *Wood*, 369 U.S. 469, 478 (1962). The final consideration is whether the issues are such as would have been tried by a jury at the time the Seventh Amendment was adopted. *See generally Marr* v *Rife*, 363 F. Supp. 1362, 1363 (S.D. Ohio 1973), *citing Ross* v *Bernhard*, 396 U.S. 531, 538 n.10 (1970); *NLRB* v *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States* v *Louisiana*, 339 U.S. 699 (1950); *Rodgers* v *Loether*, 312 F. Supp. 1008 (E.D. La. 1970); 9 Wright & Miller, Federal Practice and Procedure: Civil §2302 (1971).

The remedies sought by plaintiff are:

1. reinstatement with back pay,

2. actual damages and attorneys fees of $500,000, and

3. $100,000 punitive damages.

The claim for reinstatement and back pay is essentially equitable — a claim in the nature of restitution for employment wrongfully withheld. *Cf. EEOC* v *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *vacated and remanded on other grounds*, 97 S. Ct. 2669 (1977). Plaintiff's complaint suggests three possible constituents of his claim for "actual damages": (1) expenses in seeking other employment, (2) a significant lowering of employability, and (3) stress and embarrassment to plaintiff and his family. Defendant cites *Lynch* v *Pan*

American World Airlines, 475 F.2d 764 (5th Cir. 1973), for the proposition that "unsupported allegations for compensatory and punitive damages" cannot unilaterally alter the nature of an inherently equitable claim. The Court cannot say in this instance, however, that the allegations of compensatory and punitive damages are so lacking in merit as to be "unsupported."

Plaintiff's claim for expenses in seeking new employment appears to be a legal claim for consequential damages. Unlike the remedy of reinstatement and back pay, which is in essence a return of employment wrongfully taken away, the claim for expenses directly results from plaintiff's dismissal and is therefore a "legal" claim. Plaintiff's claim for diminished employability is, of course barred by the Court's finding in a previous opinion that defendants' failure to reemploy plaintiff did not foreclose his freedom to take advantage of other employment opportunities. Finally, plaintiff's claim for "stress and embarrassment" also states a theory for the recovery of consequential damages flowing from defendants' alleged wrongful act. This sort of claim has traditionally been cognizable by courts of law.

Plaintiff has also demanded punitive damages in the amount of $100,000. Although this claim may not have substantial support in the record, if plaintiff can establish that his nonretention was in retaliation for exercise of first amendment rights, punitive damages may be warranted assessment of punitive damages has traditionally been the function of the jury.

For these reasons, the Court must conclude that the issues raised in this case are properly triable by a jury. With the abolition of the separation of law and equity, the distinction between issues triable as of right to a jury and those that must be tried to the court has necessarily blurred. In characterizing

issues as "legal" or "equitable" a court must consider that although there is a constitutional right to have "legal" issues determined by a jury, there is no correlative constitutional right to have "equitable" issues tried by the court. *See The Supreme Court: 1958 Term*, 73 Harv. L. Rev. 128, 191 (1959). Whether plaintiff's "legal" claims are mere "unsupported allegations" as in *Lynch*, supra, should await the close of plaintiff's case and a motion for a directed verdict. A jury will be empaneled to hear this case.

IT IS SO ORDERED.

/s/ WENDELL A. MILES

Wendell A. Miles,
United States District Judge

Dated: August 29, 1977

Opinion on Motions for New Trial/JNOV

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
(Filed June 16, 1978)

ROBERT STERN,
Plaintiff,

vs. M-43-73 CA

KENNETH SHOULDICE, et. al.,
Defendants.

OPINION ON MOTIONS FOR NEW TRIAL/JNOV

INTRODUCTION

Plaintiff, a former professor at Lake Superior State College, brought suit against the College, Kenneth Shouldice (the president), and Leon Linderoth (the department chairman), contending that the decision not to renew his contract deprived him of liberty and property without due process of law. In ruling upon defendants' motion for summary judgment, the Court found that plaintiff had no fourteenth amendment property interest. Plaintiff's first amendment retaliation claim, however, raised issues of fact sufficient to preclude summary judgment. In addition, the court invited supplemental briefs on whether the case was properly tried to a jury. After receipt of these briefs, the Court ruled that planitiff's claims for damages for mental anguish, lowering of employability, and expenses in seeking other employment were legal in nature and must be tried by a jury. After several days of trial the jury returned a verdict awarding no compensatory damages, awarding $1000 in punitive damages against

each individual defendant, and granting plaintiff reinstatement and back pay in the amount of $50,155.32.

Defendants, who had moved for a directed verdict at the close of plaintiff's case, thereupon timely moved for a new trial or, in the alternative, for a judgment notwithstanding the verdict. Defendants' motions adress four basic areas: (1) the award of punitive damages, (2) the amount of back pay awarded, (3) the proprietary of a jury trial, and (4) the sufficiency of the evidence. The Court will discuss each of these areas after an initial consideration of the appropriate standard for assessing motions for new trials and motions for judgment notwithstanding the verdict.

II. MOTIONS FOR A NEW TRIAL OR JUDGMENT NOV

Federal Rule of Civil Procedure 59(a) provides that a new trial may be granted "for any of the reasons for which new trials have heretofore been granted . . . in the courts of the United States." A new trial is appropriate in instances where there has been a denial of the proper mode of trial — jury or court. *Freeman Contractors* v *Central Surety & Ins. Corp.*, 205 F.2d 607 (8th Cir. 1953). A motion for a new trial is also properly granted where there are jury errors or inconsistencies, such as where the jury is "plainly confused," *Feeney* v *Stieringer*, 162 F. Supp. 546 (W.D.N.Y. 1957), or where the jury disregarded the Court's instructions. *Pugh* v *Bluff City Excursion Co.*, 177 F. 399 (6th Cir. 1910); *Hartman* v *White Motor Co.*, 12 F.R.D. 328 (W.D. Mich. 1952) (Starr, J.). In addition, where the jury's verdict is against the weight of the evidence, the Court should exercise its discretion to grant a new trial. *Fortenberry* v *New York Life Ins. Co.*, 459 F.2d 117 (6th Cir.), *cert. denied*, 409 U.S. 981 (1972). Finally, a new trial is properly granted where the

damage award is excessive. *Mooney* v *Henderson Portion Pack Co.*, 359 F.2d 64 (6th Cir. 1964). The granting or denial of a motion for a new trial is within the discretion of the trial court, and is not reviewable except for abuse of discretion. 6A Moore's Federal Practice §59.08[1], at 59-101.

Although a motion for a new trial lies within the discretion of the Court, a motion for a judgment notwithstanding the verdict may be granted only where, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the proper result. See 5A Moore's Federal Practice §50.07[2]. In considering the motion the Court must view the evidence in the light most favorable to the nonmoving party. Thus in comparison to the motion for a new trial, the Court's power is severely circumscribed.

III. PUNITIVE DAMAGES

Plaintiff's complaint demanded $100,000 "punitive exemplary damages" against defendants Shouldice and Linderoth. The jury was instructed on punitive damages (see 3 Devitt & Blackmar, Federal Jury Practice and Instructions §85.11) and were informed

> "that such extraordinary damages may be allowed only if the jury should first unanimously award the plaintiff a verdict for actual or compensatory damages, even if such damages are nominal."

The jury verdict form was carefully read and explained to the jurors, who each had a copy of it so that they could follow and

fully understand the explanation. The jury returned its verdict against the individual defendants Shouldice and Linderoth as follows:

"x For the plaintiff

__ nominal and/or compensatory damages

$_____.

x punitive damages $1,000.00."

Defendants contend that since there was no award of actual or nominal damages, the award of punitive damages must be set aside. Plaintiff contends that by finding for the plaintiff, the jury found that he was denied his constitutional rights. Plaintiff argues that this determination carries with it a presumption of nominal damages, and that nominal damages will support an award of punitive damages. This proposition, however, may also work in the opposite direction. If the jury specifically does not award even nominal damages, it may be inferred that they did not find any violation of constitutional rights.

The court is tempted to grant the equivalent of a judgment notwithstanding the verdict by issuing a remittitur of punitive damages. The jury's action with respect to punitive damages is clearly contrary to law and to their instructions. In addition, the evidence that defendants acted maliciously, wantonly, or oppressively was negligible, consisting primarily of somewhat tenuous inferences. The jury's actions in this case, however, are indiciative of more serious problems not confined to the issue of punitive damages alone.

The jury's award of punitive damages implicates all four of the circumstances noted as proper for the granting of a new trial. Although the verdict form was clearly and carefully explained to the jury while they held a copy of it in their hands, the jury either was confused about the verdict form or else

disregarded the Court's instructions. In addition, the Court gave a very specific and approved instruction concerning punitive damages, which the jury also either misunderstood or disregarded. A further indication of the jury's confusion is the fact that they failed to take the rather voluminous and complex instructions into the jury room to assist them in their deliberations, even though they were informed that the instructions were available on request. In addition, the finding that defendants acted maliciously, wantonly, or oppressively, implicit in the award of punitive damages is against the weight of the evidence. As a result, the damage award was excessive. Since the Court finds that the jury was confused, that it disregarded the Court's instructions, that the award of punitive damages was against the weight of the evidence, and that the damage award was excessive, a new trial is properly granted.

IV. BACK PAY

In his complaint plaintiff damanded that the College reinstate him and award him back pay from the time of his nonrenewal. The court, recognizing that the amount of back pay was for the Court (See Opinion, August 27, 1977), nevertheless submitted the question to the jury in an advisory capacity. In making such a determination, the Court is bound by the factual findings of the jury as to the legal claims, and the Court therefore believed that the jury's advice on this issue would be helpful. The only evidence from which back pay could properly be calculated was plaintiff's exhibit 141, which showed the salaries of five other faculty members for the years following plaintiff's nonrenewal. The jury, however, requested only one exhibit, although they were instructed that any and all exhibits would be supplied. That one exhibit,

plaintiffs exhibit 155, showed plaintiff's earnings since his nonrenewal. The jury completed the verdict form as follows:

> "If you find for the plaintiff against the defendand college, you may award back pay to the plaintiff according to the following formula:
>
> x Amount of earnings plaintiff would have earned in employment at defendant College from date of separation to present date: $80,000.00.
>
> – (minus) amount of income, including unemployment compensation benefits, paid to the plaintiff from date of separation to present date: $29,844.68.
>
> = (equals) back pay: $50,155.32.

Defendants contend that the jury's award of back pay is totally speculative. It is defendant's argument that since the jury did not have exhibit 141 during their deliberations, its assessment of gross back pay at $80,000 must have been the product of sheer speculation. Plaintiff contends that there were factors that the jury was cognizant of justifying the award: (1) plaintiff's earnings record, (2) plaintiff's obtaining of a doctoral degree, and (3) the double digit rate of inflation. All these factors, plaintiff contends, could have properly influenced the calculation of gross back pay.

As the Court observed, assessment of back pay is a function of the Court, and the Court could simply reject the jury's finding and make its own independent determination. As with the problem of punitive damages, however, the problem of back pay raises serious questions as to the jury's actions with respect to the case as a whole. Exhibit 141 shown salary rates for five faculty members for the academic years 1970–71 to 1977–78. Plaintiff was still at the College in the years 1970–71 and 1971–72, and the academic year 1977–78 had not yet begun at the time of trial. Thus, only the years 1972–73,

1973-74, 1974-75, 1975-76, and 1976-77 are relevant. The sum of the five highest salaries from each of the five years, without regard to the recipient of those salaries, is $70,163. The most received by any one individual during those years was $68,997, received by Professor Cullen. In addition, plaintiff acknowledges in his brief that he had a "total salary expectation of $65,000."

The jury was instructed that the law required their decision to be based "solely upon the competent evidence before you." Even considering plaintiff's proferred explanation for the amount of back pay awarded, an $80,000 award was unjustified by the evidence. Although the five faculty members had a similar "earnings record" to plaintiff's, their earnings did not approach $80,000. Moreover, at least one of the five faculty members received a doctorate, but that entitled him to only a $500 annual increase. Furthermore, although consideration of inflation was conceivably proper, there was no evidence from which an informed and intelligent determination of the impact of inflation could be made. The jury's failure to follow the instruction that they were to find the facts from competent evidence, or their confusion regarding the role of the jury in determining back pay is a justification for a new trial. In addition, for the reasons stated, the jury's determination of back pay was against the clear weight of the evidence, and, as a result, the damage award was excessive. For these reasons the court finds that a new trial is justified.

V. MODE OF TRIAL

Shortly before trial the Court solicited memorandum briefs from the parties to assist it in determining whether this case was properly tried by a jury or by the Court. In an opinion issued August 29, 1977, the Court found that plaintiff's

claims for diminished employability, stress and embarrassment, expenses in finding a new job, and punitive damages were sufficient to render the case one for a jury. At the close of plaintiffs case, defendants moved to dismiss the jury, contending that plaintiff had produced no evidence from which actual or compensatory damages could be awarded. The Court held, however, that nominal or punitive damages could possibly be sustained, and consequently submitted the case to the jury. Defendants have reiterated their claims in their post-trial motions.

Lynch v *Pan American World Airlines*, 474 F.2d 764 (5th Cir. 1974) stated that an unsupported claim for compensatory damages would not suffice to transform an essentially equitable claim into a "legal" claim properly tried by a jury. The court in *Lynch* did not elaborate on how unsupported a claim for legal relief must be to justify striking the jury demand. Because the constitutional right to a jury trial is involved, however, it would appear that dismissal of the jury would be justified only where a directed verdict or motion for a judgment notwithstanding the verdict would be properly granted, because the limits on the granting of these motions also define the right to a jury trial. As a result, it must be determined whether the evidence, viewed in the light most favorable to plaintiff; leaves but one reasonable conclusion — that plaintiff was not entitled to compensatory and punitive damages. The Court cannot say that if the evidence is viewed in the light most favorable to plaintiff, there can be but one reasonable conclusion. Although the evidence was negligible, it is conceivable that reasonable persons could find that plaintiff suffered injury warranting compensatory or punitive damages on the basis of inference. As a result, the Court concludes that the case was properly tried before a jury.

There is another approach to the problem not suggested by defendants. The jury did not award either compensatory or nominal damages, and the punitive damage award is consequently clearly improper. Since all of plaintiff's legal claims were found to be without merit, the right to a jury trial is either satisfied or not implicated. The troubling feature of this argument, however, is the jury's advisory findings that plaintiff was entitled to reinstatement and back pay and that plaintiff was not renewed because of his participation in AAUP activities. The jury's actions are perhaps better explained in terms of mistake than in terms of a conscious finding of plaintiff's legal claims to be without merit.

Professor Moore has criticized the actions of the Supreme Court in expanding the right to a jury trial "at a time at which the pressure of crowded dockets and long delay in tiral have prompted a reappraisal of the usefulness of jury trials in civil cases as instruments of justice." 5 Moore's Federal Practice ¶38.12[1], at 128.23. From the standpoint of judicial efficiency, it would certainly be more appropriate to approach the jury/nonjury question as a procedural matter rather than as a matter of constitutional right. Nevertheless, although the Supreme Court has been more than willing to recognize "the practical and human limitations of the jury system" in criminal cases, see *Bruton* v *United States*, 391 U.S. 123, 135 (1968), it has been relatively insensitive to these same considerations in civil cases. As a result, in many situations courts are faced with difficult assessments of claims to determine whether they are inherently equitable or inherently legal. With the abolition of the division between law and equity, this distinction in many cases becomes virtually a distinction without a difference. The deciding factor may be the nature of the respective rights to trial by the court and trial by jury. Although the right to a jury trial is a constitutional right, and

error in denying a jury trial constitutional error, trial by the court is not constitutionally mandated, and error in denying a bench trial will more often prove harmless. For the reasons stated the Court finds that plaintiff's "legal" claims were sufficient to properly submit the case to the jury, and that the Court's action is not a basis for a new trial.

VI. SUFFICIENCY OF THE EVIDENCE

This case is governed by *Mt. Healthy City School Dist. Bd. of Educ.* v *Doyle*, 429 U.S. 274 (1977). The jury was instructed in accordance with *Mt. Healthy* that plaintiff must prove that defendants determined not to renew plaintiff's contract in retaliation for the exercise of first amendment rights, and that the exercise of first amendment rights was a substantial and motivating factor in the decision not to renew plaintiff. The jury was further instructed that if they found plaintiff had proven these elements, if defendants established that the College would have reached the same decision even if plaintiff had not exercised his first amendment rights, they must find for the defendants. Defendants contend that none of the evidence presented by plaintiff demonstrates that plaintiff's first amendment activity was a "substantial factor" in the decision not to renew his contract. Defendants also argue that even if plaintiff had shown that first amendment activity was a substantial factor in the decision, the evidence was overwhelming that plaintiff would not have been rehired anyway. In considering a motion for a judgment notwithstanding the verdict, the Court must consider all the evidence, without making credibility determinations, in the light most favorable to plaintiff. Dr. Shouldice stated he would be "less than candid" if he were to say that the first amendment incidents were not a part of his thinking in reviewing the recommendation

not to renew plaintiff's contract. The jury could, considering Dr. Shouldice's testimony in conjunction with the testimony of plaintiff, taken in the light most favorable to plaintiff, reasonably find that the first amendment activity was a "substantial factor" in the decision not to rehire plaintiff. In addition, there was conflicting evidence as to whether plaintiff would have been non-renewed even if he had not engaged in first amendment activity. The testimony of plaintiff indicated that the other reasons offered by the College for not rehiring him were without substantial basis. There was also, however, the testimony of Dr. McCabe, Dr. Linderoth, Dr. Light, Dr. Shouldice, and Dr. McKinnon establishing substantial non-first amendment reasons for the College's action. The Court concludes that there was more than a mere "scintilla" of evidence that plaintiff would not have been rehired even in the absence of first amendment activity — but not much more. As a result, the Court concludes that defendants are not entitled to a judgment notwithstanding the verdict.

The jury's implicit finding that plaintiff would have been rehired if he had not engaged in first amendment activity is, however, against the clear weight of the evidence, and thus warrants a new trial. In addition, there were certain other circumstances indicating that the jury was not properly considering this issue, which, taken in conjunction with the weight of the evidence, renders a new trial proper. *Mt. Healthy* sets up a relatively complex chain of causation to be established in proof of a first amendment retaliation claim. Even though the instructions were as clear and as simple as the Court and counsel could make them, it would be difficult for a jury to understand and apply these instructions properly without having them before them. The jury, however, did not request that the instructions be sent in. The implicit finding that plaintiff would not have been rehired "but for" his first amendment activity and the jury's award of punitive damages in the absence of an

award of compensatory or nominal damages indicates that the jury either disregarded, misunderstood, or forgot the Court's instructions. Although the instructions framed the issues, it appears from certain communications with the Court, that they were attempting to reach a decision by considering matters extraneous to the case. The jury's first question was: "Can a person be dismissed if they have Tenure?" The third question was "How many members of the AAUP were on the Tenure Board?" All these circumstances indicate confusion or disregard of the Court's instructions and further justify the granting of a new trial.

VII. CONCLUSION

For the reasons stated, the Court finds that the evidence in the case was not such that a finding for the defendants was the only reasonable conclusion. As a result, defendants' motion for a judgment notwithstanding the verdict is denied. The verdict, however, was against the weight of the evidence, the damages awarded were excessive, and the circumstances indicate that the jury acted under a misapprehension of the law or in disregard of the Court's instructions. For these reasons the Court must grant defendants' motion for a new trial.

IT IS SO ORDERED.

/s/ WENDELL A. MILES

Wendell A. Miles,
U.S. District Judge

Dated: June 16, 1978

Opinion

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
(filed September 19, 1980)

ROBERT STERN,
Plaintiff,

vs. No. M 43-73 CA

KENNETH SHOULDICE, et al.,
Defendants.

OPINION

This is an action brought pursuant to 42 U.S.C. §1983 for damages, reinstatement and back pay by a former professor at Lake Superior State College (hereinafter "LSSC"). In 1973, the plaintiff instituted this action, alleging that he was not reappointed to the faculty of LSSC in retaliation for actions or conduct protected by the First Amendment to the United States Constitution. The defendants herein are Kenneth Shouldice, president of LSSC; Leon Linderoth, Chairman of the department in which the plaintiff taught; and LSSC.

The "Legal" claims presented by the plaintiff have been submitted to a jury. Initially, the jury returned a general verdict which was inconsistent with its answers to accompanying interrogatories. Specifically, the jury found that the plaintiff was terminated for reasons violating the First Amendment,[1] but also found that he would have been terminated even in the absence of his First Amendment actions. Based upon such factual determinations, the jury should have returned a general verdict in favor of the defendants, *Mt. Healthy School District* v

Doyle, 429 U.S. 274 (1977), and the Court's jury instructions so indicated. This notwithstanding, upon resubmission the jury found in favor of the plaintiff and against defendants Shouldice and Linderoth awarding nominal damages against them in the amount of $1.00 and $2.00 respectively.

Pursuant to the provisions of Fed.R.Civ.P. 49(b), the Court, after additional instructions, "return[ed] the jury for further consideration of its answers and verdict . . . ." Subsequently, the jury returned its general verdict unchanged, but with answers to interrogatories indicating that the plaintiff would not have been terminated in the absence of his First Amendment actions.

When legal and equitable claims are presented in the same action, the legal claims are tried first before the jury, and the equitable claims are resolved thereafter by the Court in light of the jury's determination. *Dairy Queen* v *Wood,* 369 U.S. 469 (1962). Thus, presently before the Court are plaintiff's equitable claims for back pay and reinstatement. Arguments were heard and evidence received with respect thereto on June 16, 1980.

I.

Plaintiff's claims for back pay and reinstatement against LSSC face a fundamental obstacle. On the opening day of trial LSSC filed a motion to dismiss based upon the Eleventh Amendment. Despite plaintiff's assertions to the contrary, the motion is determined to be timely for the reason that the Eleventh Amendment is treated as jurisdictional and can be raised at any time, even when on appeal. *Edelman* v *Jordan,* 415 U.S. 651 (1974).

The Eleventh Amendment provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although not barred by its own terms, the Eleventh Amendment has long been held to immunize unconsenting States from suits brought by its own citizens in federal courts. *Hans* v *Louisiana*, 134 U.S. 1 (1890). Moreover, the Eleventh Amendment applies not only to states as expressly named defendants, but also to officers, agencies, and institutions which are part of the state function. *Alabama* v *Pugh*, 438 U.S. 781 (1978); *Mt. Healthy School District* v *Doyle, supra; Edelman* v *Jordan, supra; Ford Motor Company* v *Department of Treasury*, 323 U.S. 459 (1945).

LSSC is a state institution of higher learning created by an act of the Michigan legislature. Mich. Comp. Laws §390.391. Its charter explicitly declares it to be a "state institution" to be "maintained by the state" for the use of "all qualified residents of this state." Id. Nothing in the charter of LSSC states or implies that it is anything other than a state institution entitled to the privileges and immunities of the state. Cf. *Korgich* v *Regents of the New Mexico School of Mines*, 582 F.2d 549 (10th Cir. 1978); *Martin* v *University of Louisville*, 541 F.2d 1171 (6th Cir. 1976); *Skehan* v *Board of Trustees*, 590 F.2d 470, 486 (3rd Cir. 1978).

It is therefore determined that an award of back pay against the college or its officers in their official capacities is barred by the Eleventh Amendment:

> *Edelman* made clear that, absent consent to suit by the state, a federal court may not award relief against state

> officers or agencies that constitute a compensatory money judgment payable out of the state treasury, even if that relief is labeled as equitable in nature. 415 U.S. at 666, 94 S.Ct. 1347.

Skehan, supra, at 486.

Somewhat different considerations are involved in ruling upon the plaintiff's request for reinstatement. In the landmark decision of *Ex parte Young*, 209 U.S. 123 (1908), the Court held that the Eleventh Amendment was not a bar to prospective relief against the Attorney General of Minnesota enjoining him from enforcing the provisions of a statute claimed to violate the Fourteenth Amendment. The Court reasoned that:

> [I]f the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

209 U.S. at 160. It is concluded, therefore, that "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law even though such an injunction may have an ancillary effect on the state treasury." *Quern* v *Jordan*, 440 U.S. 332, 337 (1979).

However, such a conclusion does not permit a court to enter an injunction or order directly against the state. This is apparent from *Alabama* v *Pugh*, 438 U.S. 781 (1978), in which the district court had ordered measures designed to eradicate

certain conditions in Alabama prisons. On appeal the Supreme Court declared that a mandatory injunction against the State of Alabama and the Alabama Board of Corrections was impermissible:

> There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment .... Moreover, the question of the State's Eleventh Amendment immunity is not merely academic. Alabama has an interest in being dismissed from this action in order to eliminate the danger of being held in contempt if it should fail to comply with the mandatory injunction.

438 U.S. at 782. Thus, LSSC's motion to dismiss must be granted, and it cannot be ordered to reinstate the plaintiff.

Nevertheless, under the doctrine of *Ex parte Young,* this Court is empowered to order the appropriate state officials to reinstate the plaintiff to the faculty of LSSC. It appears, however, that this course of action is also unavailable because the power to reinstate this plaintiff is in the Board of Control by majority vote, Mich. Comp. Laws §390.394, and its members have not been named as defendants.[2] The plaintiff was advised of this deficiency by the Court during the oral arguments on June 16, 1980, and was challenged to produce appropriate authority as to how reinstatement might be effected. He requested, and was given, additional time in which to file an appropriate brief.

In response to the Court's inquiry, the plaintiff has moved to amend his complaint to name the individual members of the Board of Control as defendants in their official capacities. He asserts that this motion should be granted pursuant to Fed.R.Civ.P. 15. This Court, however, is unable to agree

that Rule 15 contemplates the addition of parties after the trial of the case has been completed.

The plaintiff relies on language in Rule 15 permitting amendments "even after judgment." That language, however, relates only to *issues* not raised in the pleadings which were tried with the express or implied consent of the parties. Only by the most strained kind of reasoning could such language be construed to apply to the addition of new parties, and the Court has found no support for the position advanced by the plaintiff in the cases cited in his brief or in its own research.

The case characterized by the plaintiff as "most directly on point" is *Hutto* v *Finney,* 437 U.S. 678 (1978), in which attorney's fees were awarded against a state and its department of corrections even though they apparently were not named as defendants in that action. The reasoning in that case, however, clearly would not have application to the instant controversy. The award of attorney's fees by the district court was justified as "ancillary" to prospective injunctive relief against state officers. *Hutto* unmistakenably affirms the principle that the Eleventh Amendment forbids an injunction directly against the state. Id., at 690.

Here, after the trial of this case has been fully completed, the plaintiff urges this Court to substitute the appropriate state officials as defendants. Such reasoning, however, would completely eviserate the distinction between a state and its officers. These officials should have been named as defendants at the time this litigation was commenced, or at least added by an appropriate motion prior to trial. The Court finds no authority for joining them as defendants at this stage of the proceedings,[3] and accordingly the plaintiff's prayer for reinstatement is denied.

II.

There remains for consideration an award of back pay against the individual defendants in their individual capacities.[4] In performing their function as college officials, these defendants have a qualified immunity from liability for damages. Such immunity is lost, however, if a defendant "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights [of the plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury [to the plaintiff]." *Wood* v *Strickland,* 420 U.S. 308, 322 (1975).

The jury was instructed according to this standard and returned a verdict awarding nominal damages against both individual defendants. Accordingly, it must be concluded that the jury found facts which divest these defendants of their immunity, and therefore, the defendants are liable for any back pay to which the plaintiff may be entitled. The plaintiff is entitled to recover as back pay what he would have earned had he been permitted to remain on the faculty, reduced by the amount he earned elsewhere. *Rolfe* v *County Board of Education,* 391 F.2d 77 (6th Cir. 1968). The defendants have failed to prove that other suitable positions were available which the plaintiff might have obtained. *Sparks* v *Griffin,* 460 F.2d 433 (5th Cir. 1972), and therefore the amount of back pay awarded should not be reduced because the plaintiff failed to properly obtain other employment.

During his presentation of evidence as to the amount of back wages claimed, the plaintiff reduced the amount he had earned elsewhere by 25 percent to reflect that such earnings were in a twelve month position, whereas his earnings at LSSC would have been for nine months. The Court, however,

does not believe that such reduction is appropriate, and the plaintiff has failed to cite any authority in support of this position. There is not proof that the plaintiff would have earned additional money during the summer if he had been employed at LSSC, and the Court is unable to ascertain a basis for reducing plaintiff's actual earnings as he suggests. Rather, the income actually earned is subtracted from that which would have been earned at LSSC. After making this calculation,[5] the Court concludes that the amount of back pay to be awarded is $45,696.

III.

For the reasons stated herein, LSSC's motion to dismiss is granted and plaintiff's motion to amend his complaint is denied. Judgment shall be entered in favor of the plaintiff, and damages shall be awarded against defendants Shouldice and Linderoth, in the amounts hereinbefore stated.

IT IS SO ORDERED.

/s/ WENDELL A. MILES

Wendell A. Miles,
Chief District Judge

Dated: September 19, 1980

FOOTNOTES

[1] The jury determined that plaintiff's activities in the American Association of University Professors and his counseling of an expelled student were substantial and motivating factors in the decision to terminate his employment at LSSC.

[2] Creighton D. Holden, Chairman of the Board of Control of LSSC, was originally named as a defendant in this action, but was dismissed as a party earlier in these proceedings. Since the Board of Control acts by a majority vote, his dismissal is not relevant to the present analysis.

[3] Plaintiff's argument suggests that nothing more than a change in form would occur by adding members of the Board of Control as defendants. However, such action would place them in the position of being held in contempt for violation of an order emanating from a trial in which they were not parties. Thus, more than mere form is involved and the instant motion is simply too late.

[4] There is some authority suggesting that back pay awarded against an individual defendant in his individual capacity is a "legal" remedy and therefore is a question for the jury. See *Farr* v *Chesney*, 441 F. Supp. 127 (M.D. Penn. 177). However, in the case at bar, the parties agreed that all questions of back pay should be treated as equitable and therefore it is unnecessary to resolve this issue.

This Court chooses to follow the position taken by Judge Weick in *Hildebrand* v *Board of Trustees of Michigan State University*, 607 F.2d 763, at 713:

> This case involves legal as well as equitable claims. The legal claim is for compensatory and punitive

damages charging a conspiracy and violations of the constitutional rights of plaintiff, an untenured teacher at Michigan State University, arising out of the failure of the University to reappoint plaintiff at the expiration of his term of employment so that he could obtain tenure. The equitable claim is for reinstatement with back pay under 42 U.S.C. §1983.

[5] With the exception noted above, the Court has adopted the calculations proposed by the plaintiff in determining the dollar amount of back pay:

Year	Amount that plaintiff would have earned at LSSC	Year	Plaintiff's actual earnings
72-73	$ 12,020	6/72-12/72	$ 10
73-74	13,185	1973	1,800
74-75	13,948	1974	3,212
75-76	14,952	1975	6,664
76-77	16,357	1976	9,735
77-78	17,371	1977	10,486
78-79	20,583	1978	15,628
79-80	22,023	1979	24,208
		1/80-6/80	13,000
Totals	$130,439		$84,743

$130,439
- 84,743

$ 45,696 Amount of back pay awarded

Judgment

JUDGMENT ON DECISION BY THE COURT
(Filed September 23, 1980)

United States District Court
for the
Western District of Michigan
Northern Division

ROBERT STERN
vs.
KENNETH SHOULDICE, et al

Civil Action File
No. M 43-73 CA

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Wendell A. Miles, Chief, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that plaintiff recover from defendant Kenneth Shouldice $1.00 and from defendant Leon Linderoth $2.00 and from said defendant, jointly and severally, the amount of $45,696.00 as provided by law.

It is further Ordered and Adjudged that Lake Superior State College be dismissed as a defendant herein.

Dated at Grand Rapids, Mich., this 23rd day of Sept., 1980. Gerald H. Liefer, Clerk.

/s/ ADAM LONGFELD
Deputy Clerk of Court

Opinion on Motions

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
(Filed January 15, 1981)

ROBERT STERN,
Plaintiff,

vs. No. M 43-73 CA

KENNETH SHOULDICE, et al.,
Defendants.

OPINION ON MOTIONS

By opinion dated and filed September 19, 1980, this Court entered judgment against Kenneth Shouldice and Leon Linderoth, in their individual capacities, in the amount of $45,696. This amount represented the back pay which plaintiff had lost as a result of defendants' illegal conduct in terminating plaintiff's employment at Lake Superior State College in retaliation for his constitutionally protected activities.

The Court considered plaintiff's claims for back pay and reinstatement, those being equitable claims, after a jury had found in favor of plaintiff on his legal claims and awarded nominal damages against the individual defendants. This procedure, under which a jury first decides a plaintiff's legal claims and the court then decides the equitable claims involved is the standard manner by which federal courts protect the parties' right to a jury trial in a case involving both legal and equitable issues. *Dairy Queen* v *Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed 2d 44 (1962), *Hildebrand* v *Board of Trustees of*

Michigan State University, 607 F.2d 705 (6th Cir. 1979). It was also the procedure agreed to by all the parties in this case prior to submitting the case to the jury.[1]

As part of the judgment the Court dismissed Lake Superior State College as a defendant because of its Eleventh Amendment immunity from suit deriving from its status as a state entity. This Court also determined that it could not order the plaintiff reinstated because (1) an order could not be directed to the state directly, and (2) the proper individuals, who could be ordered to reinstate the plaintiff, were not before the court. However, the court did order defendants Shouldice and Linderoth, as individuals, to pay the back pay to which plaintiff is entitled. The Court is empowered to make this order because the finding of the jury that these individual defendants had violated plaintiff's First Amendment rights stripped them of their inherent immunity as state officials. *Wood* v *Strickland*, 420 U.S. 308 (1975).

Defendant's Motion to Amend Judgment

The defendants have now moved to amend the judgment to eliminate this back pay award.[2] They argue that back pay awarded against individual defendants is an element of damages, is no longer equitable, and therefore should have been submitted to the jury. They further argue that because the Court cannot order reinstatement, it also cannot order back pay since back pay is "incidental" to an order of reinstatement.

The defendants' motion to amend the judgment is denied. In the first place, the defendants agreed prior to trial that reinstatement and back pay would be decided by the Court. Although the defendants have a right to have legal issues decided by a jury, that right can be waived. Even assuming

that the back pay award in this case was a "legal" matter, the defendants, prior to trial, waived their right to have the matter tried by a jury.

Beyond that, however, the Court does not agree that the back pay award, because it was entered against the defendants in their individual capacities, loses its equitable nature and must be submitted to a jury in the absence of a waiver.[3] Admittedly, there is some authority for the proposition that back pay recovered from individual defendants becomes an element of damages and is no longer incidental to the equitable remedy of reinstatement. *Skehan* v *Board of Trustees of Bloomsburg State College*, 501 F.2d 31 (3rd Cir. 1974). However, the issue before the Third Circuit in *Skehan* was not the question of whether the back pay award was legal or equitable for purposes of determining the right to a jury trial. Futhermore, the holding of the Court in *Skehan*, that back pay awards against individuals can be considered damages, is not dispositive of the question presented here. The Sixth Circuit stated in *Hildebrand* that:

> A key dividing line between law and equity has historically been that the former deals with money damages and the latter with injuctive relief. This distinction has been blurred by court decisions indicating that *not all money damages claims will be deemed "legal"*. [emphasis added]

supra, at 708. Thus, even if the back pay award in this case is considered to be money damages, it may still be considered an equitable remedy appropriate for decision by the court.

In fact, the Sixth Circuit expressly ruled in *Hildebrand* that a right to back pay may be decided by the court.

> . . . the chief focus to be made when determining whether a jury trial right exists is the nature of the relief sought. If the remedy sought is injuctive relief and/or

> back pay, no jury trial right attaches. In the ordinary case, if the relief sought includes compensatory and/or punitive damages, then there does exist a right to trial by jury. [*supra*, at 708.]

The Court sees no indication in this holding that the equitable nature of a back pay award depends upon who is ordered to pay the award or in what capacity they are ordered to pay it. The award in this case was calculated and ordered strictly because the plaintiff had been unconstitutionally deprived of his position and his salary. As the court in *Hildebrand* held, the plaintiff's right to receive the back pay which defendants wrongfully deprived him of rests in equity and is triable by the court.

Therefore, the judgment of $45,696 in back pay entered by this Court against the individual defendants was proper and will not be amended. The defendant's motion is denied.

Plaintiff's Motion for Attorney's Fees Costs and Prejudgment Interest

Plaintiff has moved for an amended judgment to allow him to recover costs, prejudgment interest, and attorney's fees.

In a civil rights action under 42 U.S.C. §1983, the trial court has discretion to allow the prevailing party to recover attorney's fees by provision of 42 U.S.C. §1988. This discretionary authorization has been interpreted to ordinarily allow a prevailing plaintiff to recover a reasonable attorney's fee absent some special circumstance. *Iranian Students Association* v *Edwards*, 604 F.2d 352 (5th Cir. 1979), *Monroe* v *County Board of Education*, 583 F.2d 263 (6th Cir. 1978). Numerous factors have been suggested for guiding a court's determination of what constitutes a reasonable attorney's fee. See *Rainey* v

Jackson State College, 551 F.2d 672 (5th Cir. 1977) and *King* v *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977), *cert denied*, 98 S.Ct. 3146, 438 U.S. 916, 57 L.Ed 2d 1161. Among these factors are the time and labor expended by counsel, the difficulty of the case, the experience, reputation and ability of counsel, the customary fee or rate in the community, as well as other circumstances touching upon the reasonableness of the fee.

Attorney's fees have been allowed in the context of an unconstitutional termination of a teacher from public employment. *Perez* v *University of Puerto Rico*, 600 F.2d 1(1st Cir. 1979), *Stoddard* v *School District No. 1*, 590 F.2d 829 (10th Cir. 1979), *Brown* v *Bathke*, 566 F.2d 588 (8th Cir. 1977). The Court sees no special circumstances in this case which would prevent the plaintiff as the prevailing party from recovering his attorney's fees. The fact that only a private right was involved, rather than a public question, has been held to be irrelevant in awarding attorney's fees under §1988. *Perez, supra, Zarcone* v *Perry*, 581 F.2d 1039 (2d Cir. 1978). Equally irrelevant is the fact that plaintiff's attorneys were originally retained on a contingency fee basis — that is not a "special circumstance" which prevents the recovery of attorney's fees.[5] *Sargeant* v *Sharp*, 579 F.2d 645 (1st Cir. 1978). Therefore, plaintiff is entitled to an award of reasonable attorney's fees. This Court must determine what a reasonable fee in this case will be.

The general practice in calculating a reasonable attorney's fee is to calculate the hours actually spent by the attorneys, to decide if this amount of time was reasonably necessary to adequate representation, and to multiply that time by a reasonable hourly rate. This practice has been approved by the Sixth

Circuit in *Oliver* v *Kalamazoo Board of Education*, 576 F.2d 714 (6th Cir. 1978):

> Attorney's fees awards should be high enough to attract competent counsel yet not so high as to provide a windfall for them. Multiplying the number of hours properly spent times a reasonable hourly rate is sufficient to serve this goal.

However, a court is clearly not restricted to such methods and may adjust an attorney fee to reflect circumstances not reflected in a straightforward calculation of hours spent times hourly rate. See *Monroe* v *County Board of Education, supra*, and *Keown* v *Storti*, 456 F. Supp. 232 (D.C. Pa. 1978), *affirmed* 601 F.2d 575 (3rd Cir. 1978).

In the instant case, plaintiff's counsel has submitted two affidavits, one after each trial of this matter, asserting total hours spent on this case of 306 hours over three and one-half years. In addition, counsel states that a predecessor attorney, who originally filed the complaint on behalf of the plaintiff in 1973, put in some 200 hours of work. Apparently no accurate records were kept at that time because the case was taken on a contingency fee basis and §1988 had not yet been amended to provide for attorney's fees in such cases. Altogether, plaintiff requests an award of not less than $37,758.44 in attorney's fees.

As regards the 306 hours accounted for by plaintiff's counsel's affidavit, the Court finds that this was a reasonable amount of time expended over three years and two trials.[6] A reasonable hourly rate for this time is $60 per hour. The Court notes that this average hourly rate takes into account that trial time is normally compensated at a higher rate than non-trial time. The reasonable fee calculated by this method is therefore $18,360. However, the Court will adjust this figure up-

ward to reflect (1) the contribution of the prior attorney, and (2) the difficulty to present counsel caused by taking over the case just prior to the first trial. The total attorney's fee granted will be $20,360.

Under Federal Rule of Civil Procedure 54(d) costs are generally allowed to a prevailing party as a matter of course. No circumstances present here militate against this general rule. Therefore the bill of costs submitted by plaintiff is accepted and judgment will be entered entitling plaintiff to recover his costs of $2,798.55.

The plaintiff has also asked for prejudgment interest on the back pay award. The general rule is that interest runs as a matter of right on a liquidated claim. *Bituminous Casualty Corp.* v *Lynn*, 503 F.2d 636 (6th Cir. 1974). When the amount of a claim is readily ascertainable and not in dispute it is liquidated. *Lynn, supra.* A claim for back pay, based as it is on a designated salary or salary scale, is by its nature a liquidated claim. Furthermore, an allowance of prejudgment interest is particularly appropriate where an award of back pay is made, since without it the employer is unjustly enriched at the expense of the employee. *McClanahan* v *Mathews*, 440 F.2d 320 (6th Cir. 1971).

Therefore, prejudgment interest will be allowed in the amount of $15,585.22 representing 6% interest on plaintiff's back pay entitlement as that entitlement accrued.

In summary, judgment in this case will be amended to reflect an award in favor of the plaintiff of $20,360 in attorney's fees, $2,798.55 as other costs, and $15,585.22 in prejudgment interest on the back pay award.

Defendant Colleges Motion for Costs and Attorney's Fees

Lake Superior State College has moved for an award of costs and attorney's fees against the plaintiff on the theory that it is a prevailing party. The college was dismissed from this suit because the Eleventh Amendment prevented this court from ordering plaintiff's reinstatement or back pay directly against a state-run college. Nevertheless, the jury did return a verdict against both the president of the college and plaintiff's department chairman in their individual capacities. The fact that plaintiff obviously did have a valid cause of action against high-ranking officials of Lake Superior State College makes it clear that including the college as a party defendant was neither frivolous nor done in bad faith. There was a legitimate and substantial question as to the college's liability.

The case law and legislative history make clear that the attorney fee provision of §1988 were intended to compensate prevailing plaintiffs as a matter of course in civil rights actions. In the case of a prevailing defendant, however, recovery of attorney's fees will only be allowed if the plaintiff's suit was frivolous, vexatious or brought for harrassment purposes. *Hughes* v *Rowe*, 101 S.Ct. 173 (1980), *Christiansburg Garment Co.* v *EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed 2d 648 (1978), *Lopez* v *Arkansas County Independent School District*, 570 F.2d 541 (5th Cir. 1978), *Hughes* v *Repko*, 578 F.2d 483 (3rd Cir. 1978). The plaintiff's suit against Lake Superior State College was neither frivolous, vexatious, groundless, nor brought for harrassment purposes; therefore the school's motion for attorney's fees is denied.

The College has also asked to recover its costs. The three defendants in this case shared the same counsel throughout,

and there was essentially only one defense. The costs of defending the defendant college were identical to the costs of defending the individual college officials. Therefore, although the college may theoretically be a prevailing party, allowing it to recover its costs from plaintiff, who won his case, would in these circumstances be unjust. The motion for costs to the college must therefore be denied.

IT IS SO ORDERED.

/s/ WENDELL A. MILES,
Wendell A. Miles,
Chief District Judge

Dated: January 14, 1981

FOOTNOTES

[1] This case has been tried twice by different juries. After the first trial the court granted defendants' motion for a new trial. At the second trial, no reinstatement or back pay issue was submitted to the jury.

[2] Within the ten day time limit the defendants filed alternative motions for judgment notwithstanding the verdict, a new trial, or for an amended judgment. Since then, however, in briefs and at oral argument, they have only argued for an amended judgment so only that motion is before the court. In any event, defendants have not stated any grounds which would entitle them to JNOV or to a new tiral.

[3] As this court stated in a prior opinion in this case:

> . . . in many situations courts are faced with difficult assessments of claims to determine whether they are

> inherently equitable or inherently legal. With the abolition of the division between law and equity, this distinction in many cases becomes virtually a distinction without a difference.

(Opinion filed June 16, 1978). The truth of this statement is amply demonstrated by the issue presently before the court.

[4] The defendants' other argument — that because the defendants cannot be ordered to reinstate the plaintiff they cannot be ordered to pay him back pay — is without merit. The plaintiff is entitled to reinstatement but the court does not have jurisdiction over the necessary parties to order such reinstatement. Although the individual defendants do not have the power to reinstate the plaintiff, they do have the power to pay him money, which is all that they are required to do by the judgment.

[5] Even so, the existence of a contingency fee agreement may be relevant in determining the amount of the fee. The court notes that the total recovery in this case will be approximately $60,000 in back pay and prejudgment interest. Therefore, the attorneys' fee allowed will, by coincidence, represent an approximate one-third contingency, which plaintiff's counsel has stated was the original agreement between him and plaintiff. This further convinces the court that the attorneys' fee granted in this case is a reasonable one.

[6] This time must be deemed particularly reasonable in light of the averments of defendants' counsel that they expended over 1,000 hours in preparaton and trial of this case.

Judgment

JUDGMENT ON DECISION BY THE COURT
(Filed February 12, 1981)

United States District Court
for the
Western District of Michigan
Northern Division

ROBERT STERN

vs.

KENNETH SHOULDICE, et al.

Civil Action
File No. M 43-73

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Wendell A. Miles, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged

Judgment is hereby amended. In addition to $45,696 in back pay awarded to plaintiff, plaintiff is awarded $20,360 in attorneys fees, $2,798.55 as other costs, and $15,585.22 in pre-judgment interest.

Dated at Grand Rapids, Michigan, this 12th day of February, 1981.

Gerald H. Liefer,
Clerk of Court

/s/ ROBERT W. POWELL

Robert W. Powell
Deputy Clerk

No. 81-1156
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Filed July 15, 1981)

ROBERT STERN,
Plaintiff-Appellee

v.

KENNETH SHOULDICE, et al.,
Defendants-Appellants

ORDER

Upon consideration of plaintiff-appellee's motion to dismiss this appeal for lack of jurisdiction and the response submitted in relation thereto,

It is determined that the motion to dismiss is frivolous and entirely without merit. It is expressly provided under Rule 4(a)(6), Federal Rules of Appellate Procedure, that a judgment or order entered within the meaning of Rule 4(a) is deemed so entered when it complies with Rule 58, Federal Rules of Civil Procedure. Under this latter rule and interpretive case law authority, a judgment must be entered on a separate document which, requirement, may be waived only when the parties would not be prejudiced by the absence of the separate document. *Bankers Trust Co.* v *Mallis*, 435 U.S. 381 (1978). Since a separate judgment was entered in this case

pursuant to Rule 4(a)6, Federal Rules of Appellate Procedure, the appellate time clearly did not begin to run with the filing of the earlier opinion because it was not properly entered, as yet, until the separate judgment was entered. Since the notice of appeal was filed within thirty days thereafter, this Court possesses jurisdiction to entertain this appeal.

It is, accordingly, ORDERED that the motion to dismiss be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

No. 81-1156
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Filed November 5, 1982)

ROBERT STERN
Plaintiff-Appellee

vs.

KENNETH SHOULDICE, et al.
Defendants-Appellants

Before: KEITH and CONTIE, Circuit Judge; and MORTON, District Judge.*

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* The Honorable L. Clure Morton, Chief Judge of the United States District Court for the Middle District of Tennessee, sitting by designation.

ORDER

Defendants Kenneth Shouldice and Leon Linderoth appeal from a judgment entered in the captioned case on September 23, 1980, as amended to allow attorneys' fees and costs on February 12, 1981. The appellee has filed a motion to dismiss this appeal as being untimely.

The sequence of events is as follows: The district judge filed an opinion on September 19, 1980, which was followed by a judgment reflecting the written opinion and a jury verdict on September 23, 1980. By the judgment, plaintiff was awarded damages. On October 3, 1980, defendants filed a pleading styled "Motion for Judgment Notwithstanding the Verdict or New Trial or Amendment of the Judgment." In the alternative defendants, by this document, sought a judgment n.o.v., a new trial, or the deletion of any award of damages or back pay. By an opinion which ended "IT IS SO ORDERED", dated January 14, 1981, all of the relief sought by defendants was denied. However, by judgment entered February 12, 1981, attorneys' fees and costs were allowed as provided in the January 14, 1981, document. Notice of this appeal was filed on March 6, 1981.

Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that the time for appeal begins to run from the entry of an order denying relief. The relief sought by defendants was denied on January 14, 1981. *Napier* v *Delaware, Lackawanna & Western R.R.* 223 F.2d 28 (2d Cir. 1955); *Lindsey* v *Perini*, 409 F.2d 1341 (6th Cir. 1969); *Smith* v *Hudson*, 600 F.2d 60 (6th Cir. 1979). The judgment for attorney's fees and costs did not prolong the time for filing a notice of appeal. *White* v *New Hampshire Dep't of Employment Security*, 455 U.S. ____, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982).

Rule 4(a)(5) of the Rules of Appellate Procedure provides that the district court, upon motion and a showing of excusable neglect, may extend the time for filing a notice of appeal if said motion is filed within 30 days of the date when the time to appeal has expired. However, under no circumstance can there be an extension of more than 30 days. *Lindsey* v *Perini, supra*. Thus, fifty-one days having elapsed before notice of appeal, the district judge on remand could grant no relief in this case.

The appeal is dismissed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

Clerk

No. 81-1156
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Filed January 20, 1983)

ROBERT STERN
Plaintiff-Appellee

vs.

KENNETH SHOULDICE, etc., et al.
Defendants-Appellants

Before: KEITH and CONTIE, Circuit Judges; and MORTON, District Judge.*

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* The Honorable L. Clure Morton, Chief Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

ORDER

Defendants-Appellants in the above-captioned case have filed a petition for rehearing and a motion for permission to file a petition for rehearing in excess of fifteen pages under Rule 40 of the Federal Rules of Appellate Procedure. The petition and motion are in response to this court's order of November 5, 1982 which dismissed appellants' appeal as being untimely filed.

Appellants' petition and motion are granted. Appellants shall immediately serve upon the plaintiff-appellee a copy of the petition for rehearing and the accompanying memorandum of law. Appellee shall file a response to appellants' petition by February 4, 1983.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

No. 81-1156
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Filed March 25, 1983)

ROBERT STERN
Plaintiff-Appellee

vs.

KENNETH SHOULDICE, et al.
Defendants-Appellants

Before: KEITH and CONTIE, Circuit Judges; and MORTON, Chief District Judge.*

* The Honorable L. Clure Morton, Chief Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

ORDER

Defendants-appellants in the above captioned case have filed a petition for rehearing in response to this court's order of November 5, 1982 which dismissed appellants' appeal as being untimely filed.

Having considered the materials submitted by the parties pursuant to this court's order of January 20, 1983, the court grants appellants' petition for rehearing.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

Clerk

No. 81-1156
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Filed March 25, 1983)

ROBERT STERN
Plaintiff-Appellee

vs.

KENNETH SHOULDICE, et al.
Defendants-Appellants

Before: KEITH and CONTIE, Circuit Judges, and MORTON, Chief District Judge.*

ORDER

By separate order entered on this date, the court granted appellants' petition for rehearing in the above captioned case. Accordingly, this court's order of November 5, 1982, which dismissed appellants' appeal as being untimely filed, is VACATED.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

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* The Honorable L. Clure Morton, Chief Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 81-1156

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT STERN,
Plaintiff-Appellee,
v.
KENNETH SHOULDICE, et al.,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed April 15, 1983

Before: KEITH and CONTIE, Circuit Judges; and MORTON, Chief District Judge.*

CONTIE, Circuit Judge. This is the rehearing of an appeal by Dr. Kenneth Shouldice and Dr. Leon Linderoth of a district court judgment rendering them liable for instigating the termination of Dr. Robert Stern, an assistant professor of speech and drama at Lake Superior State College in Michigan. Stern sued under 42 U.S.C. § 1983, alleging that he was denied academic tenure in retaliation for exercising first amendment rights. The jury awarded damages to Stern in the amount of

* The Honorable L. Clure Morton, Chief Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

$2.00 against Linderoth and $1.00 against Shouldice. Pursuant to equitable powers, the trial judge assessed $45,696.00 back pay against Shouldice and Linderoth in their individual capacities. The court later granted Stern $15,585.22 in pre-judgment interest and $23,158.55 in costs and attorney's fees. Although we affirm the assessment of nominal damages, costs and attorney's fees, we reverse the award of back pay and pre-judgment interest.

I.

Lake Superior State College became an independent academic institution on January 1, 1970. Though governed by an eight-member Board of Control, the College's chief executive officer was defendant Shouldice, its president. Defendant Linderoth headed the Arts and Letters division. Robert Stern, the plaintiff, joined the faculty in September, 1967. During his sojourn at the College, Stern served on the Faculty Senate and on the Administrative Counsel, the highest administrative body on campus. Stern also became president of the local chapter of the American Association of University Professors (AAUP).

This litigation resulted from Stern's claim that he was denied tenure in retaliation for exercising first amendment rights on two separate occasions. The first situation concerned an article, written by Professor Kaplan of the University of Michigan, which appeared in the *AAUP Michigan Newsletter*. Kaplan authored the piece after visiting the College in December, 1969. A draft of the article, which was somewhat critical of Shouldice and the College in general, was submitted to the College's chapter of AAUP so that the latter could correct any inaccuracies. The group suggested minor changes and returned the draft. Just before publication in January, 1970, Kaplan sent a copy of the revised article to Shouldice. Believing that the piece contained serious factual errors, Shouldice met with Stern who in turn suggested that the president call

Kaplan. Shouldice did so but was told that the article had already gone to press.

Shouldice was concerned about adverse publicity because the College had only recently achieved independence and because the school was competing for qualified faculty in what was then a scarce market. He therefore wrote a reply to Kaplan's article, but the *AAUP Michigan Newsletter* never published it. Furthermore, after reading a statement by Stern in *The Compass*, the campus newspaper, to the effect that the AAUP only censured a school after careful investigation, Shouldice wrote to Stern that "in light of recent events, this is a very shallow statement. The inference of purity usually should be matched with personal action to support it."[1] Subsequent to the article's publication, Shouldice asked the Faculty Senate to replace Stern as the Senate's representative to the Administrative Counsel. In May, 1970, Linderoth orally informed Stern that he would not be recommended for tenure when the appropriate time arrived. Nevertheless, Stern was reappointed for the 1970-71 academic year.

Stern asserts in his complaint that he was denied tenure partially because the Kaplan article criticized the College. Defendants counter that plaintiff was discharged because he associated poorly with colleagues and because his talents did not comport with proposed curriculum changes. In addition, Stern's involvement with the Kaplan article supported the tenure decision not because the administration was attempting to quell dissent, but because Stern's failure to correct purportedly obvious factual errors when given the opportunity to do so indicated personal immaturity or lack of competence not desired of tenured faculty members. Stern is said to have been privy to the facts because of his positions on the Faculty Senate and on the Administrative Counsel.

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[1] Plaintiff stressed at trial that Kaplan's article was not a formal censure. The record reflects that AAUP censures must be approved by the national organization rather than by state or local affiliates.

The second incident involved a student who drove a College car to Canada without permission in July, 1970. Canadian officials impounded the auto after finding marijuana inside. After meeting with the student, Shouldice terminated his summer job on campus. Following a hearing, the Dean of Students suspended the youth from school. The student then contacted Stern, his school-appointed faculty advisor. After listening only to the former's story, Stern opined that the student may have been summarily expelled and suggested that he seek legal advice. The student did so and was subsequently readmitted to the College. Shouldice then wrote a letter to Stern which criticized the latter's handling of the matter.

Stern alleges in his complaint that he was denied tenure in retaliation for exercising his first amendment right to advise a student to seek legal counsel. Defendants assert that the episode was relevant to the tenure decision not because Stern suggested that the student take possible legal action against the College, but because Stern's failure to check with either the Dean of Students or the youth's file before concluding that no procedural protections had been afforded was proof that Stern undertook his counselling duties in a cavalier or immature fashion.

In May, 1971, Linderoth informed both Stern and Dr. Light, vice president for academic affairs, that Stern would not be recommended for tenure because of his uncooperative attitude and because of his lack of expertise in drama theory. The three men met on May 13, 1971 at which time Stern requested that his case be heard by the tenure committee. Although Light recommended to Shouldice that Stern be denied tenure, the latter asked the committee to review the matter. Finding an irreconcilable conflict between Linderoth and Stern, the committee stated that the reasons given for discharging Stern had not been refuted. Upon receiving this report, Shouldice notified Stern that he would not be retained after the 1971-72 academic year.

The Board of Control subsequently approved this decision. Stern then requested an opportunity to present his case directly to the Board. The Board permitted him to submit a lengthy document in his defense and also invited his attorney to make comments at a Board meeting. The Board again approved the denial of tenure on November 19, 1971.

At trial, the jury returned a general verdict in favor of the College but against Shouldice and Linderoth in their individual capacities for nominal damages. Pursuant to an agreement of the parties, the back pay issue had not been submitted to the jury. The court found the verdict inconsistent with the answer to an accompanying interrogatory. Upon resuming deliberations, the jury conformed the interrogatory answer to the general verdict.

Exercising equitable powers, the court awarded back pay against Shouldice and Linderoth as individuals. Judgment was properly entered on September 23, 1980. Defendants timely filed post-judgment motions for j.n.o.v., for a new trial and to amend the judgment. Stern filed a motion for pre-judgment interest, costs and attorney's fees. In an opinion rendered on January 15, 1981, the court denied defendants' motions and granted plaintiff's motion. The judgment for interest, costs and attorney's fees was entered February 12, 1981. Defendants filed their notice of appeal on March 6, 1981.

II.

The first issue requiring discussion is whether defendants' notice of appeal was timely filed. Because our treatment of Stern's motion for pre-judgment interest, costs and attorney's fees disposes of this issue, we do not discuss the effect of defendants' motions.

Since Federal Rule of Appellate Procedure (FRAP) 4(a)(1) mandates that appeals be filed within thirty days after entry of judgment, defendants' notice of appeal normally

would have been due on October 23, 1980. Since Stern filed a post-judgment motion, however, we must consider the effect of FRAP 4(a)(4) which provides in part that the thirty-day appeal period for all parties runs from the date of entry of the order granting or denying a Federal Rule of Civil Procedure (FRCP) 59 motion for amended judgment. FRAP 4(a)(6) states that such a judgment is "entered" when there is compliance with FRCP 58 and 79(a), *i.e.*, a separate document is entered on the docket. In the present case, the assessment of pre-judgment interest, costs and attorney's fees was entered for purposes of FRAP 4(a)(6) on February 12, 1981. The notice of appeal was filed on March 6, 1981. Consequently, if granting pre-judgment interest, costs and attorney's fees constituted a Rule 59 amendment of judgment, defendant's appeal was timely.

Although the Supreme Court has recently held that costs and attorney's fees should be granted under FRCP 54(d) rather than under FRCP 59, *White* v. *New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), defendants contend that the assessment of over $15,500.00 in pre-judgment interest on the back pay claim was obtainable only under the latter rule. Stern counters, however, that pre-judgment interest was available under FRCP 60(a)'s provisions governing clerical errors.

The third circuit has held that if a party is entitled to pre-judgment interest as a matter of right, the judgment can be corrected under FRCP 60(a). *Glick* v. *White Motor Co.*, 458 F.2d 1287, 1293-94, (3d Cir. 1972). On the other hand, if granting pre-judgment interest is discretionary, the judgment must be amended pursuant to FRCP 59. *See Scola* v. *Boat Frances, R., Inc.*, 618 F.2d 147, 152 (1st Cir. 1980). Stern argues that he was entitled to pre-judgment interest as a matter of right. The district court found that Stern's request for back pay was a liquidated claim. This court has held that pre-judgment interest "runs as a matter of right on a liquidated claim." *Bituminous Casualty Corp.* v. *Lynn*,

503 F.2d 636 (6th Cir. 1974). Thus plaintiff concludes that the original judgment was correctible under FRCP 60(a) and that defendants' appeal was untimely.

Though Stern's argument is not without force, we must reject it. This court recently held in *Bricklayers' Pension Trust Fund* v. *Taiariol*, 671 F.2d 988, 990 (6th Cir. 1982), that "in the absence of a statutory provision the award of pre-judgment interest is in the discretion of the court." As a result, whether or not a claim is liquidated is inconsequential. Moreover, even were the liquidated-unliquidated distinction applicable, the *Taiariol* case involved a plaintiff's liquidated claim for money contractually owed to a pension fund. In light of this court's more recent authority, we hold that a grant of pre-judgment interest pursuant to a post-trial motion is discretionary with the trial court and requires an amendment of judgment under FRCP 59. *See Chicago & Northwestern Railway Co.* v. *Union Packing Co.*, 527 F.2d 592 (8th Cir. 1976). Since defendants filed their notice of appeal within thirty days after entry of the amended judgment, this appeal is timely.

III.

The plaintiff alleges that tenure was denied because he criticized both Shouldice and the College. While public educational institutions generally are entitled to wide latitude when making tenure decisions, a professor or teacher may not be denied tenure in retaliation for constitutionally protected speech. *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Manchester* v. *Lewis*, 507 F.2d 289 (6th Cir. 1974). When a plaintiff alleges a violation of this right, the claim is governed by the procedure set forth in *Mt. Healthy*. According to that decision, the plaintiff must first prove that he engaged in constitutionally protected activity. Secondly, he must demonstrate that such activity

was a substantial or motivating factor in the determination to discharge him. The teacher or professor having thus established a *prima facie* case, the burden then shifts to the school to show that it would have denied tenure to the plaintiff even in the absence of the protected activity. Put another way, if the finder of fact determines that the plaintiff would have been retained but for the exercise of first amendment rights, the discharge was based upon constitutionally impermissible grounds.

The question of whether or not Stern's speech was constitutionally protected was a question of law for the district court. *Hildebrand* v. *Board of Trustees, Michigan State University*, 662 F.2d 439 (6th Cir. 1981), *cert. denied*, 102 S.Ct. 1758 (1982); *Daulton* v. *Affeldt*, 678 F.2d 487 (4th Cir. 1982); *Bernasconi* v. *Temple Elementary School District*, 548 F.2d 857 (9th Cir), *cert. denied*, 434 U.S. 825 (1977). The court therefore erred in submitting this issue to the jury.[2] Though the defendants apparently did not object to this procedure, the court committed plain error. *Schneider* v. *City of Atlanta*,

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[2] The trial judge instructed the jury as follows:

> The fourth element which the plaintiff must establish is that in his activities as an officer and/or member of the Lake Superior State College Chapter of the AAUP and/or in his activities in assisting and counseling [the student] in connection with the disciplinary action taken against him, he was exercising his constitutionally protected right of freedom of speech under the first amendment. . . .
>
> This means that citizens of the United States enjoy a broad freedom to speak out and to join associations or groups to make their views known. These rights, however, are not absolute. In determining whether the plaintiff's involvement in the AAUP incident or the [student] incident was constitutionally protected you must strike a balance between the interest of the plaintiff in commenting upon matters of public concern with respect to the AAUP incident and in counseling an expelled student . . . . against the College's interest in promoting the efficiency of its services through its employees. By weighing these competing values you must determine whether first amendment considerations preclude termination of the plaintiff because of his involvement in either or both of the foregoing incidents.

628 F.2d 915 (5th Cir. 1980). This court must therefore decide whether the activities engaged in by Stern fall within the ambit of the first amendment.

In regard to the article printed in the *AAUP Michigan Newsletter*, we hold that because Kaplan wrote the article, plaintiff did not engage in protected speech. Since the article summarized Kaplan's post-visit impressions of the College, the piece contained his speech as opposed to the plaintiff's. That Stern belonged to a local chapter of AAUP which suggested minor changes that were incorporated into the article does not transform Kaplan's article into Stern's speech. Therefore, under the facts of this case, Stern's review of the article did not constitute such participation in the preparation of the article so as to accord him first amendment protection.

We do hold, however, that counseling the student to seek legal advice about the suspension was protected under the first amendment. The analysis of this question is controlled by *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968), in which it was held that courts must "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." In achieving this balance, courts should consider whether an employee's comments meaningfully interfere with the performance of his duties or with the employer's general operations, create disharmony among co-workers, undercut an immediate supervisor's discipline over the employee or destroy the relationship of loyalty and trust required of confidential employees. *Id.* 569-70.

None of these problems occurred in this case. The record is devoid of evidence that Stern's counseling adversely affected his teaching, caused problems among other faculty members or undermined the authority of Linderoth as the head of the Arts and Letters Division. Nor was Stern a con-

fidential employee of Shouldice or Linderoth as that term is used in *Pickering*. Finally, Stern's advice did not disrupt College operations in general. Precisely the opposite appears to have been true; for after the student sought legal counsel, the matter was smoothly resolved by readmitting the student subject to certain restrictions on participation in extra-curricular activities.

Defendants contend that the incident was properly considered in denying tenure not because Stern criticized the College but because he inadequately investigated the situation before giving advice.[3] This allegedly tended to show that Stern lacked the deliberative qualities desired of a professional scholar. *Cf. Weisbrod* v. *Donigan*, 651 F.2d 334 (5th Cir. 1981) (speech may be indicative of undesirable personality traits for which an employee may be discharged). This argument must fail however. Having found Stern's speech to be protected, we hold that it was a question for the jury whether the defendants were motivated to terminate Stern in retaliation for his speech or in an attempt to rid the College of an unqualified professor. *Mt. Healthy, supra*. The jury found against the defendants on this point in an interrogatory and we will not disturb its decision.

Shouldice and Linderoth next claim that even if Stern's speech merited first amendment protection and even if it were established that Stern would not have been discharged absent his exercise of that right, defendants are entitled to

[3] Defendants claim that *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979), is relevant to this question. We disagree. *Givhan* held that where an employee privately confronts his public employer/supervisor, the time, place and manner of speech should be considered together with the content of the speech in determining whether first amendment protection exists. Since Stern did not personally confront Shouldice or Linderoth during the counseling incident, *Givhan* is inapposite. Instead, criticizing the College and its administrators before a third party, i.e., the student, is more akin to the public criticism which occurred in *Pickering*. Accordingly, we look primarily to the content of Stern's speech in determining whether first amendment protections apply. *See Givhan*, 439 U.S. at 415 n.4.

qualified immunity. The Supreme Court recently modified the qualified immunity test in *Harlow* v. *Fitzgerald*, — U.S. —, 102 S.Ct. 2727, 2738 (1982):

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Defendants contend that because first amendment law in this area was only beginning to develop in the early 1970s and because the *Pickering* test required courts to balance various factors in each case, no person could reasonably predict in a given situation whether discharging an employee would violate the latter's first amendment rights. Shouldice and Linderoth therefore claim that they did not infringe upon Stern's clearly established constitutional rights.

We disagree. The *Pickering* case, which was decided before this dispute arose, clearly established limits on a public employer's freedom to prohibit or regulate employee criticism. The court also delineated the factors that lower courts were to consider when addressing future cases. As has been indicated, a straightforward application of these factors demonstrates that Stern's counseling activities were protected. We therefore hold that a reasonable person should have known in 1970-71 that Stern's speech was constitutionally protected under *Pickering*. Shouldice and Linderoth are not entitled to immunity.

IV.

Defendants assert that the district judge committed several other errors during trial. They first contend that the court should have granted summary judgment against the plaintiff because the Board approved the denial of tenure after conducting its own hearing. Defendants argue that an

independent review of the case by the Board would as a matter of law sever the casual link between Shouldice's and Linderoth's improper conduct and Stern's discharge. The short answer to this objection is that it was for the jury to determine whether the Board was improperly motivated or whether Shouldice's and Linderoth's tainted recommendations substantially affected an otherwise independent Board determination. Since defendants had the opportunity to present this theory to a jury who rejected it, we find no error.

Secondly, defendants contest the exclusion of two exhibits from evidence. One proposed exhibit consists of minutes of the Board of Control meeting at which Stern formally was denied tenure. These minutes contain a factual statement made by Raymond Clevenger, trial counsel for the defendants in this case. Plaintiff objected that were the exhibit admitted, he would be forced to call Mr. Clevenger as a hostile witness. This would have resulted in Mr. Clevenger simultaneously being both witness and advocate. In response to this objection, the court gave Mr. Clevenger the choice of continuing as counsel and sacrificing the evidence or withdrawing as counsel, thereby saving the evidence. Since Mr. Clevenger freely chose the former option, no error occurred.

The second exhibit is a Canadian customs report stating that marijuana was found in the auto which the student took from the College. The court ruled the exhibit inadmissible because mention of illegal drugs might have inflamed or confused the jury. We hold that the court did not abuse its discretion in excluding this evidence.

Thirdly, Shouldice and Linderoth contend that having found the jury's general verdict to be inconsistent with the answer to the third interrogatory, the district court should have entered judgment on the interrogatory rather than ordering the jury to resume deliberations. This argument is without merit. The district court found that the interrogatory answers were consistent with each other. In such situations,

FRCP 49 clearly empowers the trial judge to order further jury deliberations. The record reflects that the court did not suggest to the jury how to resolve the conflict. Under these circumstances, there was no error.

V.

Since the district judge did not commit reversible error during trial of Stern's counseling claim, the award of nominal damages must stand. The award of back pay is, however, another matter. The general rule in this circuit is that while an assessment of back pay against a public educational institution is an equitable remedy, *Hildebrand* v. *Board of Trustees of Michigan State University*, 662 F.2d 439, 442 n.8 (6th Cir. 1981), a back pay award against school officials in their individual capacities is legal in nature. *Shirley* v. *Chagrin Falls Exempted Village Schools Board of Education*, 521 F.2d 1329, 1334 (6th Cir.), *cert. denied*, 424 U.S. 913 (1976); *see also Burt* v. *Board of Trustees*, 521 F.2d 1201, 1204-05 (4th Cir. 1975). As a result, we consider whether the plaintiff ever requested back pay from Shouldice and Linderoth, who were sued in their individual capacities, and whether defendants agreed to submit the issue of back pay to the court.

A fair reading of Stern's complaint discloses that he demanded back pay only from the College.[4] While the term "back pay" appears in the prayer for relief against the College, it does not appear in the claim for compensatory and punitive damages against Shouldice and Linderoth. Actual damages were limited at trial to claims for expenses of seeking other employment, injury to professional reputation, stress, embarrassment and mental anguish. Since Stern never sought back pay from the individual defendants and since such a remedy is legal in nature, the district court erred in awarding back

[4] The complaint's prayer for relief has never been amended. The College was ultimately held immune from back pay liability because of the eleventh amendment.

pay against Shouldice and Linderoth pursuant to its equitable powers.

Plaintiff contends, however, that the parties agreed to submit to the court the issue of back pay against the individual defendants. We disagree. A colloquy between the court and counsel indicates that the parties agreed to submit to the court only the question of back pay against the College, pending disposition of the eleventh amendment problem. Stern's counsel suggested the following:

> So what I would propose is that the trial proceed, that the jury be allowed to determine liability in relation to the individual Defendants, and that the liability of the Defendant College be left for determination by the Court after a subsequent record can be made as to the nature of the entity with which we are dealing, and as to – so that we can deal with the question of whether or not that entity can appropriately claim Eleventh Amendment immunity.
>
> Now in conjunction with that suggestion, I would further suggest that no question of back pay be submitted to the jury. . . . [I]t was my understanding that the question of back pay would be decided by the Court upon a record made subsequent to the jury's return of a verdict in relation to the individual Defendants, if indeed they found those Defendants liable. If the jury in fact finds the Plaintiff's First Amendment rights were not violated, there would be no need for this Court to entertain any future questions, I would presume. *If they find that the Plaintiff's First Amendment rights were violated, they may then assess damages in accordance with the Court's instructions in relation to the individual Defendants and I would ask the Court to subsequently entertain the question of back pay in the – and reinstatement in the context of the record that I feel needs to be made as a minimal effort to appropriately resolve the question of Eleventh Amendment immunity that was raised during this trial.*

> Additionally . . . to the extent that the Plaintiff's request or demand for jury is addressed in this cause to the question of reinstatement and back pay, I would hereby withdraw the request for a jury trial to that extent, and ask that on the question of a nominal, actual or compensatory, on punitive damages, as to the individual Defendants be submitted to the jury. . . .
>
> Indeed, *by withdrawing the back pay and reinstatement from the jury, that would allow this court upon whatever supplemental record is necessary or appropriate, to decide those issues, together with the issue of immunity, once we know the nature of the entity involved,* and that basically is the position of the Plaintiff, and the reasons we have asserted in support of that position. (Emphasis supplied.)

These comments demonstrate that plaintiff was seeking back pay solely against the College. Although the jury was to decide the damage issue in relation to Shouldice and Linderoth, the back pay question was to be considered only in the context of the College's claim to eleventh amendment immunity. The clear inference from this proposal is that a claim for back pay against the individual defendants was not in the case. In light of his subsequent actions, the trial judge must have understood otherwise. Nevertheless, this position does not comport with the theory of Stern's case as he both pleaded and presented it. We therefore hold that Stern was entitled to recover neither back pay nor pre-judgment interest on that sum.

The judgment of the district court is AFFIRMED IN PART and REVERSED IN PART. Each party shall bear its own costs on this appeal.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 81-1156
(Filed April 15, 1983)

ROBERT STERN,
Plaintiff-Appellee,

vs.

KENNETH SHOULDICE, et al.,
Defendants-Appellants.

Before: KEITH and CONTIE, Circuit Judges; and MORTON, Chief District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed in part and reversed in part in accordance with the opinion of this Court.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: July 5, 1983

COSTS: NONE

Filing fee . . . . . $
Printing . . . . . $
Total . . . . . $

A True Copy.

Attest:

/s/ JUDY K. KING

Deputy Clerk

No. 81-1156
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Filed June 20, 1983)

ROBERT STERN
Plaintiff-Appellee

vs.

KENNETH SHOULDICE, etc., et al.
Defendants-Appellants

Before: KEITH and CONTIE, Circuit Judges; and MORTON, District Judge.*

ORDER

The appellee, Robert Stern, has filed a petition for a rehearing in the above captioned case. This court's opinion was filed on April 15, 1983.

Having considered the arguments raised in the appellee's petition, it is ORDERED that a rehearing be, and hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

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* The Honorable L. Clure Morton, Chief Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

No. 83-463

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

ROBERT STERN,
Petitioner,

-vs-

KENNETH SHOULDICE, et al.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS WHY THIS WRIT SHOULD NOT BE GRANTED

I. THE PETITIONER FAILS TO RAISE AN IMPORTANT ISSUE OF LAW.

II. APPELLANT ALSO DESIRES THIS COURT TO REVIEW THE RECORD OF THE TRIAL AND CORRECT THE LOWER COURT'S AND THE APPELLATE COURT'S FACTUAL CONCLUSIONS AS TO THE STATE OF THE PLEADINGS AND WHETHER THE PLAINTIFF VOLUNTARILY SURRENDERED A DAMAGE CLAIM DURING THE TRIAL.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
REASONS WHY THIS WRIT SHOULD NOT BE GRANTED	1
I. THE PETITIONER FAILS TO RAISE AN IMPORTANT ISSUE OF LAW	1
II. APPELLANT ALSO DESIRES THIS COURT TO REVIEW THE RECORD OF THE TRIAL AND CORRECT THE LOWER COURT'S AND THE APPELLATE COURT'S FACTUAL CONCLUSIONS AS TO THE STATE OF THE PLEADINGS AND WHETHER THE PLAINTIFF VOLUNTARILY SURRENDERED A DAMAGE CLAIM DURING THE TRIAL	4
CONCLUSION	5

TABLE OF AUTHORITIES

Cases:	Page
APO–Financial Computer Service v *First National Bank*, 703 F2d 1261 (11th Cir, 1983)	3
Bituminous Casualty Corp v *Lynn*, 503 F2d 636 (6th Cir, 1974)	2
Bricklayers' Pension Trust Fund v *Taiariol*, 671 F2d 988, 990 (6th Cir, 1982)	2
Chicago & Northwestern Railway Co v *Union Packing Co*, 527 F2d 592 (8th Cir, 1976)	2
Cloyd v *Richardson*, 510 F2d 485 (CA 6, 1975)	3
Goodman v *Sikorsky & Mott*, 682 F2d 44 (2nd Cir, 1982)	3
Graver Tank & Mfg Co v *Linde Air Products Co*, 336 US 271, 275 (1948)	4
Huecker v *Milburn*, 538 F2d 1241 (CA 6, 1976)	3
Layne & Bowler Corp v *Western Well Works*, 261 US 387, 393 (1923)	1
Rodgers v *United States*, 332 US 371 (1947)	2
Royal Indemnity Co v *United States*, 313 US 289 (1941)	2
Stern v *Shouldice*, 706 F2d 742 (1983)	1
Thompson v *Immigration Service*, 375 US 84 (1964)	3
United States of America v *Johnston*, 268 US 220, 227 (1925)	4
US v *Indrelunas*, 411 US 216, 93 S Ct 1562, 36 L Ed 2d 202 (1972)	3
Miscellaneous:	
FRAP 4(a)(4) and (6)	1, 2, 3
FR Civ P 54(d)	1
FR Civ P 58	3
FR Civ P 59	1
FR Civ P 79(a)	3

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The above respondents, by their attorneys, Byron H. Higgins and Raymond F. Clevenger, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion and order in this case. This case is reported at *Stern* v *Shouldice*, 706 F2d 742 (1983).

Respondents adopt the opinion of the Sixth Circuit Court of Appeals.

REASONS WHY THIS WRIT SHOULD NOT BE GRANTED

I. THE PETITIONER FAILS TO RAISE AN IMPORTANT ISSUE OF LAW.

In determining whether or not an issue is of importance to the jurisprudence of the United States, the Supreme Court distinguishes between importance to the public generally and the importance of the issues to the particular parties involved in litigation. *Layne & Bowler Corp* v *Western Well Works*, 261 US 387, 393 (1923).

Petitioners seek a ruling as to whether a post-judgment motion for the award of pre-judgment interest must be filed pursuant to FR Civ P 54(d) rather than FR Civ P 59.

Although petitioner acknowledges that the award of pre-judgment interest is discretionary with the district court, petitioner argues that if the damages are liquidated, then such a motion may be filed pursuant to FR Civ P 54(d). Therefore the time for appeal under FRAP 4(a)(4) expired and the Sixth Circuit should have dismissed respondent's appeal.

The Sixth Circuit held that the distinction between liquidated and unliquidated damages was irrelevant to the

issue, since the award of pre-judgment interest in all cases is discretionary with the court. It cited two decisions to support its position. *Bricklayers' Pension Trust Fund* v *Taiariol*, 671 F2d 988, 990 (6th Cir, 1982); *Chicago & Northwestern Railway Co* v *Union Packing Co*, 527 F2d 592 (8th Cir, 1976).

There are three reasons why this petitioner does not present an important issue of law deserving of this Court's attention. Firstly, there is no split among the circuits as to this issue, nor does petitioner cite any contrary opinions to demonstrate that the circuits are divided. Secondly, even if petitioner were correct, it would not be dispositive of respondents' right of appeal under FR Civ P 4(a)(4). Finally, there is a question of whether petitioner's claim for back wages is a liquidated claim.

Petitioner's damage claim for back wages is not a liquidated claim. The cases cited by the petitioner to support his proposition are distinguishable from the instant case. The cited cases relate to contractual provisions between the parties that provide for the payment of sum certain or establish a formula for the determination of damages. See *Royal Indemnity Co* v *United States*, 313 US 289 (1941), and *Rodgers* v *United States*, 332 US 371 (1947). As the Sixth Circuit has previously held, only:

> When the amount of a claim can be ascertained readily by reference to a formula in the contract and none of the facts is in dispute or when the amount of claim itself is not disputed, the claim is liquidated. *Bituminous Casualty Corp* v *Lynn*, 503 F2d 636 (6th Cir, 1974).

In this instance the petitioner was employed on a contract with the College. He lost his employment when the contract was allowed to expire. In order to determine the amount of lost wages, it would be necessary to hear evidence relative to the amount of future compensation which petitioner would have received had he continued in the employ of the College following the termination of his

appointment and mitigation of damages. Thus the damages flowing from his discharge cannot fall under the definition of liquidated. *APO-Financial Computer Service* v *First National Bank*, 703 F2d 1261 (11th Cir, 1983); *Goodman* v *Sikorsky & Mott*, 682 F2d 44 (2nd Cir, 1982).

Nor is the issue raised on this writ dispositive of respondents' right to appeal to the district court's judgment. Several other arguments were also presented to the Sixth Circuit in support of the timeliness of the appeal. These are:

1. That the district court assured the defendant on January 30, 1981, fifteen days after the opinion was entered, that an appeal should not be filed until a judgment was entered. This effectively tolled the running of the appeal period. *Thompson* v *Immigration Service*, 375 US 84 (1964);

2. That FRAP 4(a)(4) and (6) requires that an order be entered in conformity with FR Civ P 58 and 79(a). Rule 58 provides that every judgment be on a separate document. Rule FR Civ P 79(a) requires that each order be entered on the docket book as a separate document. The opinion of the court dated January 14, 1981, although it concludes with the phrase "IT IS SO ORDERED," is not in compliance with FR Civ P 58 in that it was combined with an opinion. The title of the document entered by the district court on January 14, 1981, was simply "OPINION ON MOTIONS" and did not contain a declaration that it was an "order." Nor was it entered on the docket as an "order." The separate order which met the compliance of Fr Civ P 58 was the amended judgment entered by the court on February 12, 1981. *US* v *Indrelunas*, 411 US 216, 93 S Ct 1562, 36 L Ed 2d 202 (1972); *Huecker* v *Milburn*, 538 F2d 1241 (CA 6, 1976); *Cloyd* v *Richardson*, 510 F2d 485 (CA 6, 1975).

Thus if petitioner were to succeed, it would only result in remand to the Court of Appeals for ruling on the other issues raised by petitioner.

Therefore, petitioner has failed to submit to this Court an important issue of law of public significance worthy of this Court's time.

II. APPELLANT ALSO DESIRES THIS COURT TO REVIEW THE RECORD OF THE TRIAL AND CORRECT THE LOWER COURT'S AND THE APPELLATE COURT'S FACTUAL CONCLUSIONS AS TO THE STATE OF THE PLEADINGS AND WHETHER THE PLAINTIFF VOLUNTARILY SURRENDERED A DAMAGE CLAIM DURING THE TRIAL.

This Court has stated that "We do not grant certiorari to review evidence and discuss specific facts." *United States of America* v *Johnston*, 268 US 220, 227 (1925). The United States Supreme Court is "a court of law, . . . , rather than a court for correction of errors in fact finding, [and] cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg Co* v *Linde Air Products Co*, 336 US 271, 275 (1948).

Petitioner desires this Court to review the pleadings and ascertain whether their *ad damnum* clause states a claim against the individually named defendants for lost wages. Secondly, petitioner desires this Court to review the transcript of the trial court to determine whether the petitioner surrendered any claim for damages that he might have asserted against the individually named defendants, as the Sixth Circuit found.

Clearly, this does not meet the guidelines established by the United States Supreme Court and therefore does not constitute a basis for granting a writ of certiorari.

CONCLUSION

WHEREFORE, it is respectfully requested that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 31, 1983